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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

CESAR A. PERALES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Is it proper for a district court to entertain a lawsuit brought by aliens seeking adjustment of status, which challenges the Immigration and Naturalization Service's regulations articulating the bases for granting and denying that relief, notwithstanding 8 U.S.C. 1255a(f), which provides a single exclusive means of review in the courts of appeals for denials of adjustment of status?

2. Does 8 U.S.C. 1255a, which requires all applications for adjustment of status to be filed before a specified deadline, bar the district courts from ordering the Immigration and Naturalization Service to extend that deadline?

PARTIES TO THE PROCEEDING

Petitioners are William P. Barr, Attorney General of the United States: Terrance O'Reilly, Assistant Commissioner of the Immigration and Naturalization Service; Edward Wildblood, Legalization Director of the INS Eastern Regional Office; Gilbert Tabor, INS Regional Processing Facility Director; Scott Blackman, INS District Director of the New York District; and Louis W. Sullivan, M.D., Secretary of Health and Human Services.

Respondents are Cesar A. Perales, Commissioner of the New York State Department of Social Services; New York State Department of Social Services; Robert Abrams, Attorney General of the State of New York; State of New York; City of New York; Sara Doe, Jane Roe, Anne Coe, Fran Foe, Mary Moe, Linda Loe, Susan Soe, Zelda Zoe, individually and on behalf of their minor children, and on behalf of all others similarly situated and their minor children.

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No.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

CESAR A. PERALES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of William P. Barr, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 967 F.2d 798. The opinion of the district court (App., *infra*, 36a-107a) is reported at 762 F. Supp. 1036. A related opinion of the court of appeals (App. *infra*, 116a-119a) is reported at 847 F.2d 55. Another related opinion of the court of appeals (App., *infra*, 113a-115a) is unreported, and related opinions of the district court (App., *infra*., 108a-109a, 110a-112a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 8 U.S.C. 1255a(a), (d), and (f) are set out in the appendix (App. *infra*, 119a-125a).

2. 8 C.F.R. 245a.2(d) and 245a.2(k) are set out in the appendix (App. *infra*, 125a-133a).

STATEMENT

1. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 96-603, 100 Stat. 3359, Congress provided a one-time opportunity for thousands of aliens residing illegally in the United States to acquire legal residency, by permitting aliens to apply to the Immigration and Naturalization Service (INS) to adjust their status to that of an alien lawfully admitted for temporary residence. See 8 U.S.C. 1255a. The statute sets out a number of detailed substantive requirements for an alien to qualify for this special relief. Generally, these requirements limited relief to aliens who could establish (1) continuous unlawful residence in the United States since before January 1, 1982; (2) continuous physical presence in the United States since November 6, 1986 (the date IRCA was passed); (3) admissibility to the United States as an immigrant; and (4) that they filed an application during a twelve-month period designated by the Attorney General, but starting no later than 180 days after November 6, 1986.[1] 8 U.S.C. 1255a(a).

A key concern of IRCA was to ensure that the adjustment program was limited to a finite period and proceeded in an expeditious manner. Accordingly, as noted above, an express condition for eligibility, set forth in Section

[1] The Attorney General extended the program as long as possible, designating the twelve-month application period to begin on the last permissible day, May 5, 1987, and to continue through May 4, 1988. 8 C.F.R. 245a.2(a)(1).

1255a(a)(1), limited relief to aliens who applied in a timely manner; Section 1255a(f)(2) provides that "[n]o denial of adjustment of status * * * based on a late filing of an application * * * may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government."

Section 1255a(f) also established the process for judicial and administrative review of adjustment determinations based on factors other than a lack of timeliness. First, paragraph (1) of Section 1255a(f) makes the statutory procedures exclusive, by providing that there "shall be no administrative or judicial review of a determination respecting an application for adjustment of status * * * except in accordance with this subsection." Second, paragraph (3) requires the Attorney General to establish procedures for "a single level of administrative appellate review." Finally, paragraph (4) provides that judicial review will be available "only in the judicial review of an order of deportation under [8 U.S.C. 1105a]."

2. This case involves 8 U.S.C. 1255a(a)(4), which provides that adjustment of status is available only to individuals who were "admissible to the United States as an immigrant." One prohibition on admissibility as an immigrant bars "[a]ny alien who, in the opinion of the * * * Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge." 8 U.S.C. 1182(a)(4) (Supp. II 1990). IRCA mitigated this provision somewhat, by providing that an alien "is not ineligible for adjustment of status * * * due to being inadmissible under section 1182(a)(4) of this title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of

public cash assistance." Section 1255a(d)(2)(B)(iii) (Supp. II 1990).[2]

In 1987, INS promulgated regulations implementing this provision, which provided that the determination of whether an alien was likely to become a public charge should include consideration not only of whether the alien himself had received public cash assistance, but also of whether his dependents had. See 52 Fed. Reg. 16,209 (1987) (defining the term "[p]ublic cash assistance" to include "income or needs-based monetary assistance * * * received by the alien or his or her immediate family members through federal, state or local programs designed to meet subsistence levels"). The regulation went on to explain that "[p]ast acceptance of public cash assistance within a history of consistent employment will enter into th[e] decision" whether the alien "is likely to become a public charge." 8 C.F.R. 245a.2(k)(4) (1988). Subsequent guidelines emphasized that "[t]he existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge." See App., *infra*, 45a.[3]

3. Respondents, a group of individuals and state and local governmental bodies, commenced this action in April 1988, claiming that the regulations implementing

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[2] The statute also authorized the Attorney General "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest," to waive any of the excludability provisions contained in Section 1182(a). Section 1255a(d)(2)(B)(i).

[3] As similar provision appeared in the regulation regarding the Attorney General's discretionary power to waive the public-charge bar, which provided that "[a]n alien who has a consistent employment history which shows the ability to support himself and his or her family * * * may be admissible" through a discretionary waiver. 52 Fed. Reg. 16,212 (1987).

the public-charge provisions were invalid to the extent that they would bar an alien from adjustment of status based on the receipt of public assistance by other members of the family. On April 19, 1988, the district court denied respondent's application for a temporary restraining order extending the statutory deadline, based on its conclusion that respondents did not face imminent irreparable harm. App., *infra*, 108a-109a. A week later, on April 26, 1988, the district court denied respondents' motion for a preliminary injunction, for similar reasons. *Id.* at 110a-112a.

4. Respondents appealed, and a two-judge panel of the Second Circuit entered an injunction pending appeal. App., *infra*, 113a-115a. The injunction defined a class including "all undocumented aliens residing in New York State on or before May 4, 1988 who assert that he or she believed that the receipt of AFDC or Home Relief by his or her United States citizen or permanent resident dependents would affect his or her eligibility for legalization." *Id.* at 114a. The injunction required INS to continue accepting applications from class members pending the argument of the appeal, and barred INS from deporting any class members during the same period. *Ibid.* After argument, the court of appeals affirmed (*id.* at 116a-118a) the district court's denial of a preliminary injunction, "substantially for the reasons stated in [the opinion of the district court]," *id.* at 118a.

5. The district court conducted a six-day trial in October 1990 and then issued a detailed opinion dismissing respondents' action. App., *infra*, 36a-107a. On the merits, the court concluded that the regulations were consistent with IRCA. *Id.* at 81a-89a. The court explained that

> the relevant regulations as a whole consistently provided that any legalization applicant whose U.S. citizen children received public cash assistance at any time on or after January 1, 1982 *might* be excludable from the legalization program as a public charge or likely to

> become a public charge, but that a determination of excludability had to be based on all of the alien's circumstances.

Id. at 84a. The court rejected respondents' argument that INS had established an absolute rule denying relief to any applicant whose family members had received public cash assistance. *Id.* at 84a-86a. Because there was "no doubt that INS had the discretion to include aid received *indirectly by the applicant* through family members * * * in the mix of factors and circumstances bearing upon an applicant's likelihood of becoming a public charge," *id.* at 86a, the court upheld the regulation. The court also rejected respondents' claim that INS failed to disseminate its policies sufficiently to apprise the respondent class of the circumstances under which it would be eligible for relief. *Id.* at 89a-97a.

Alternatively, the court concluded (App., *infra*, 97a-107a) that it did not have "the authority to compel INS to accept applications after the May 4, 1988 expiration of the amnesty period," *id.* at 97a-98a. Relying on this Court's decision in INS v. *Pangilinan*, 486 U.S. 875 (1988), the court reasoned that "no application filed after the * * * deadline is 'timely filed,' " and thus "aliens who did not file applications before [the deadline] are statutorily ineligible." App., *infra*, 101a. Finally, the court ruled that it would not exercise its equitable powers in favor of respondents in any event, "because there has been no showing of affirmative misconduct by the Government in its administration of the legalization program under IRCA." *Id.* at 101a.[4]

6. The court of appeals reversed. App., *infra*, 1a-35a.

a. First, the court ruled that it had jurisdiction notwithstanding the exclusive judicial review provisions in

[4] In light of the district court's disposition of the case, it did not have occasion to consider petitioners' argument that the governmental respondents did not have standing. See App., *infra*, 80a-81a.

8 U.S.C. 1255a(f). App., *infra*, 13a-19a. The court relied on the decision of the Ninth Circuit in *Catholic Social Services, Inc.* v. *Thornburgh*, 956 F.2d 914, cert. granted, 112 S. Ct. 2990 (1992), for the proposition that Section 1255a(f) bars district court actions only if they challenge the denial of a "single" application, not if they challenge a rule applicable to a class of applications. App., *infra*, 15a-16a. Similarly, the court rejected the government's reliance on the decision of the D.C. Circuit in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991), petition for cert. pending, No. 91-1924. App., *infra*, 16a-17a.

b. On the merits, the court reversed the district court and concluded that the regulations violated IRCA. App., *infra*, 20a-24a. The court concluded that IRCA absolutely lifted the public-charge bar for any alien who had a history of employment and did not receive public assistance himself, even if the receipt of public assistance by other family members suggested that the alien was likely to become a public charge. Because the regulations took into account the receipt of public assistance by other family members, the court concluded that they were invalid. *Id.* at 21a-22a.

c. Finally, the court rejected the government's contention that it could not properly require INS to grant relief to aliens who failed to file applications for adjustment before the deadline. App., *infra*, 26a-34a. The court based this conclusion on its agreement with the Ninth Circuit's decision in *Catholic Social Services* that "extending the deadline for those denied the full twelve months 'effectuates, rather than frustrates, the public policy established by Congress.' " App., *infra*, 29a (quoting *Catholic Social Services*, 956 F.2d at 922). Accordingly, the court remanded the case to the district court, with instructions to require INS to accept applications for an additional year from any applicant who could demonstrate that he "was aware of the policies contained in [the challenged regulations] and that but for this awareness the applicant would have filed a timely application for adjustment of status." App., *infra* at 35a.

REASONS FOR GRANTING THE PETITION

1. The question whether IRCA precluded judicial review in this case is identical to the first question pending before the Court in *Barr* v. *Catholic Social Services, Inc.* (*CSS*), No. 91-1826. In *CSS*, we have argued that "Section 1255a(f)(1) bars review by the district courts of the consistency of * * * [regulations implementing IRCA] with Section 1255a," 91-1826 Pet. Br. 14-15. If the Court adopts our construction of the statute, then the decision of the court of appeals here would be incorrect, and should be reversed.[5]

2. Similarly, the question whether the court of appeals had authority to order INS to grant relief to individuals who did not file timely applications is identical to the second question pending in *CSS*. If the Court accepts our argument that applicants who did not file timely applications "do not, and cannot, fall within the class for whom Congress authorized adjustment of status," 91-1826 Pet. Br. 16, then the decision of the court of appeals ordering INS to consider applications for adjustment of status filed by individuals who did not file timely applications would be incorrect on this ground as well.

[5] We have provided respondents with a copy of our brief on the merits in *CSS*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Barr* v. *Catholic Social Services, Inc.*, No. 91-1826, and disposed of in accordance with the Court's decision in that case.

Respectfully submitted.

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SEPTEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 253, 254, 255—August Term, 1991
Docket Nos. 91-6133, 6135, 6167

CESAR A. PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; ROBERT ABRAMS, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK; STATE OF NEW YORK; CITY OF NEW YORK; SARA DOE; JANE ROE; ANNE COE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-APPELLANTS

FRAN FOE; MARY MOE; LINDA LOE; SUSAN SOE; ZELDA ZOE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-INTERVENORS-APPELLANTS

v.

RICHARD L. THORNBURGH, AS ATTORNEY GENERAL OF THE UNITED STATES; TERRANCE O'REILLY, AS ASSISTANT COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; EDWARD WILDBLOOD, AS LEGALIZATION DIRECTOR OF THE INS EASTERN REGIONAL OFFICE; GILBERT TABOR, AS INS EASTERN REGIONAL PROCESSING FACILITY DIRECTOR; SCOTT BLACKMAN, AS INS DISTRICT DIRECTOR OF THE NEW YORK DISTRICT; LOUIS W. SULLIVAN, M.D., AS SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES

Argued September 30, 1991
Decided June 24, 1992

Before: CARDAMONE, WALKER and MCLAUGHLIN, *Circuit Judges*.

Appeal from a Judgment entered April 22, 1991 of the United States District Court for the Southern District of New York (Conboy, *J.*), entering judgment in favor of the government and dismissing the complaint. Reversed and Remanded.

WALKER, *Circuit Judge*:

This case concerns the amnesty program of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 *et seq.* Plaintiffs-appellants ("plaintiffs") challenge Immigration and Naturalization Service ("INS") regulations implementing the statutory exclusion of aliens "likely at any time to become a public charge." *See* 8 U.S.C. § 1182(a)(4) (Supp. II 1990). Plaintiffs claim that the regulations violated IRCA by disqualifying self-supporting aliens whose family members received public assistance. While the INS later revised its regulations to address plaintiffs' concerns, plaintiffs' maintain that prior to this revision the regulations deterred qualified aliens from applying, thereby denying them the full statutory application period. They further claim that the agency failed to "broadly disseminate information" regarding the revisions as required by

statute. *See* 8 U.S.C. § 1255a(i) (1988). The United States District Court for the Southern District of New York (Conboy, *J.*), found the INS public charge regulations consistent with IRCA, and dismissed plaintiffs' complaint. We reverse the ruling of the district court and remand for further proceedings consistent with this opinion.

BACKGROUND

The Immigration Reform and Control Act's Amnesty Program.

By the 1980's, Congress faced a serious dilemma in immigration policy. A multitude of aliens had illegally entered the United States and settled here, causing damage to domestic labor, the economy, and to the opportunities of those seeking to lawfully cross our borders. *See* H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 52, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5,649, 5,656. However, the cost and difficulty of removing these illegal aliens made their deportation a practical impossibility. *Id.* at 49, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5,649, 5,653. Moreover, Congress recognized that many illegal aliens had over time made significant contributions to the nation, and that our own past failures in enforcement were in part responsible for the surge in illegal immigration. *Id.*

IRCA provided a compromise solution. It undercut the incentives for illegal immigration by sanctioning employers who hire undocumented workers. At the same time, IRCA offered amnesty to undocumented aliens who, over the years, had shown their capacity to be contributing members of society. This case concerns the INS' implementation of the amnesty program.

A. *The Amnesty Provisions.*

Amnesty was to take place in two stages. During a twelve-month period beginning "on a date . . . designated by the Attorney General" and later established by regulation as May 5, 1987 through May 4, 1988 (the "application period"), illegal aliens could apply to the INS for temporary resident status. 8 U.S.C. § 1255a(1) (1988). The second stage, to commence nineteen months after the receipt of temporary resident status, gave aliens one year, later extended to two, *see* Pub. L. No. 101-649, § 703(a), 104 Stat. 5086 (1990), in which to apply for permanent resident status. 8 U.S.C. § 1255a(b)(1)(A), 2(C) (1988 & Supp. II 1990). Aliens could tender their applications to the INS or to Qualified Designated Entities ("QDEs"), nongovernmental agencies enlisted to serve as "buffers" between aliens and the government. *See* 8 U.S.C. § 1255a(c)(1) (1988). IRCA further required the INS, in conjunction with the QDEs, to "broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits." 8 U.S.C. § 1255a(i) (1988).

IRCA conditioned adjustment to temporary resident status on the meeting of four broad eligibility requirements. Sections 1255a(a)(1)-(4) mandated the Attorney General to grant this adjustment of status where the applicant: (1) had filed a timely application; (2) had maintained continuous unlawful residence since 1982; (3) had maintained a continuous physical presence since November 6, 1986; and (4) was "admissible to the United States as an immigrant." 8 U.S.C. § 1255a(a)(1)-(4) (1988).

The current appeal centers on the fourth criterion: admissibility as an immigrant. To show that she was "admissible . . . as an immigrant," 8 U.S.C. § 1255a(a)(4) (1988), an alien had to establish, *inter alia*, that she was

not inadmissible under 8 U.S.C. § 1182(a)(4) (Supp. II 1990) pursuant to which "[a]ny alien who, in the opinion of the . . . Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable." IRCA's "Special Rule for Determination of Public Charge" (the "statutory special rule") limited the agency's broad discretion in this area, stating that an alien "is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(4) of this title [relating to the public charge determination] if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). In a separate provision, IRCA authorized the Attorney General to waive "in the case of individual aliens" any of the excludability provisions of § 1182(a), including the public charge provision, "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1255a(d)(2)(B)(i).

B. *The INS' May 1, 1987 Public Charge Regulations.*

Pursuant to these provisions, the INS promulgated final regulations on May 1, 1987, 52 Fed. Reg. 16,205 *et. seq* (1987) (codified as amended at 8 C.F.R. § 245a (1992)). The INS broke the statutory amnesty scheme down into three parts. First, the agency's "Proof of financial responsibility" regulation mirrored the statutory language by providing that "[a]n applicant for adjustment of status . . . [is] likely to become [a] public charge[ ] unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." 52 Fed. Reg. 16,211 (1987)

(codified as amended at 8 C.F.R. § 245a.2(d)(4) (1992)).[1] Integral to this provision was the regulation's definition of "public cash assistance" as "income or needs-based monetary assistance . . . received by the alien or his or her immediate family members through federal, state or local programs designed to meet subsistence levels." 52 Fed. Reg. 16,209 (1987) (codified as amended at 8 C.F.R. § 245a.1(i) (1992)).[2] The third element, entitled "Special Rule for Determination of Public Charge" (the "regulatory

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[1] The provision stated:

(4) Proof of financial responsibility. An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment.

[2] This provision stated in full:

"Public cash assistance" means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health). 52 Fed. Reg. 16209 (1987).

special rule") provided in relevant part that "[a]n alien who has a consistent employment history which shows the ability to support himself and his or her family . . . may be admissible" through a discretionary waiver from the Attorney General. 52 Fed. Reg. 16,212 (1987) (codified as amended at 8 C.F.R. § 245a.2(k)(4) (1992)).[3]

C. *Developments in INS Policy.*

Prior to the issuance of the May 1, 1987 regulations, groups representing aliens had commented that the proposed public charge regulations unlawfully conditioned a showing of self-support upon the non-receipt of public assistance by family members. Just over four months into the application period, the INS began a series of "clarifications" and amendments of the public charge provisions. A

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[3] The regulatory special rule provides that:

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible under paragraph (k)(2) of this section [providing for waivers for humanitarian purposes, to assure family unity, or when in the public interest]. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. 52 Fed. Reg. 16,212 (1987).

September 23, 1987 memorandum from Associate Commissioner Norton to the four regional commissioners removed the regulatory special rule's waiver requirement, stating that "[n]o waiver application is necessary to apply the special rule for determination of public charge." Commissioner Norton repeated this instruction in an October 1, 1987 letter to Edward J. Wildblood, the Regional Legalization Officer of the Eastern Regional Office. On November 17, 1987, the INS formalized this policy, issuing a technical amendment that deleted the waiver requirement from its special rule. 52 Fed. Reg. 43,843 (Nov. 17, 1987) (codified at 8 C.F.R. § 245a.2(k)(4) (1992)).

The INS also revised its definition of "public cash assistance." A November 23 1987 memorandum from Commissioner Norton to the four regional commissioners explained that "SSI [Supplemental Security Income] should be considered as public cash assistance only with regard to the person who receives it. SSI should not be attributed as public cash assistance to the immediate family members who reside with the recipient, but who themselves are non-recipients." The agency's position with respect to Aid to Families with Dependent Children (AFDC) developed more slowly. A December 9, 1987 memorandum from Paul Virtue, INS General Counsel, to Terry O'Reilly, Deputy Assistant Commissioner for Legalization, explained that

> if a family of three applied for AFDC and the parents were both ineligible aliens the benefit would still be granted to the United States Citizen child and that the child is considered the recipient. . . . For our purposes, it would seem to me that the parents in such a situation would not be considered to have received "public cash assistance".

In a February 12, 1988 letter responding to questions from a District of Columbia Official, Assistant Commissioner

William Slattery indicated that "[p]ublic charge status is not conveyed to the parent-payee if the United States citizen child is the recipient [of AFDC]." Finally, on April 21, 1988, just two weeks before the close of the application period, Commissioner Norton adopted this position in a memorandum to the four Regional Commissioners:

> As a general rule, the reciept of AFDC benefits by a member of the legalization applicant's family is not attributed to the applicant for purposes of determining the likelihood that the applicant will become a public charge. . . . If, however, the family is reliant on the AFDC benefits as its sole means of support, the legalization applicant may be considered to have received public cash assistance. This determination must be made on a case-by-case basis and upon consideration of the totality of the applicant's circumstances.

Following the May 4, 1988 close of the application period, in a written decision dated December 29, 1988, Commissioner Norton broadened the April 21, 1988 position. He held that even a non-working applicant whose children had received public cash assistance would not be excludable as likely to become a public charge, since

> [i]t is not unusual for a mother to stay at home to care for her children, especially when the children have not started school. A mother's absence from the work force to care for her children is not by itself sufficient basis to find the mother likely to become a public charge.

Matter of A., Interim Decision No. 3097 at 4 (Imm. Nat. Serv. Dec. 29, 1988). Finally, in July of 1989, more than one year after the May 5, 1988 application cutoff date, the INS formally amended its regulatory definition of "public cash assistance" to delete all reference to the alien's imme-

diate family members. The Federal Register notice explained that "[t]he receipt of public cash assistance by immediate family members will not have a bearing on an applicant's eligibility for legalization." 54 Fed. Reg. 29,442, 29,443 (1989).

The July 1989 amendments also removed from the regulatory special rule references to an alien applicant's family. From that point on "an applicant need[ed] only [to] demonstrate a consistent employment history that shows the ability to support himself or herself." *Id.* at 29,443-44.

Prior Stages of This Lawsuit.

The prior history of this lawsuit bears on our disposition of this appeal, and thus merits some discussion. On April 1, 1988, approximately one month before the end of the application period, plaintiffs filed their complaint. They asserted, first, that the INS public charge regulations were facially invalid since they included consideration of public assistance by an alien's family members in the finding as to whether the alien herself was self-supporting. Plaintiffs further alleged that the INS had failed to "broadly disseminate", as required by statute, its policy statements and regulatory amendments revising the public charge regulations. *See* 8 U.S.C. § 1255a(i) (1988). The class of non-governmental plaintiffs, as later certified, consisted of

> [a]ll undocumented aliens residing in New York State who may be excludable from the Legalization Program established by IRCA as "likely to become public charges" under the standards set forth in INS regulations 8 C.F.R. §§ 245a.1(i), 245a.2(d)(4) and 245a.2(k)(4) based in whole or in part upon the receipt of public cash assistance by the applicant's U.S. citizen or legal permanent resident family members, including but not limited to those individuals who

were deterred from filing applications for legalization under the Legalization program.

These plaintiffs sought a declaration as to the unlawfulness of the regulations and the dissemination effort. They further sought an order requiring defendants to readjudicate, without reference to family members' receipt of public assistance, all applications of class members denied on public charge grounds and requiring the agency to accept applications for a period of one year from those class members whom the unlawful regulations had deterred from filing.

In early April, 1988, plaintiffs applied for a temporary restraining order directing the INS to disseminate its revised policy that a child's receipt of public cash assistance does not convey public charge status to the parent. In response, the INS represented to the district court that it would issue instructions to this effect to all regional and district legalization offices, and to all approved QDEs who were assisting the INS in the legalization process. The district court thereupon denied the application. Commissioner Norton issued the stated instructions in the April 21, 1988 memorandum to the four regional commissioners, referenced earlier. Plaintiffs, arguing that the clarification came too late to benefit those class members deterred from applying, moved for a preliminary injunction. The district court denied the motion, but on May 4, 1988 we granted plaintiff's motion for a temporary injunction and ordered the INS to accept applications accompanied by the statutory fee, a number of which were filed. On May 18, 1988 four aliens who had applied during this period moved to intervene. On May 19, 1988, we affirmed the district court's denial of the preliminary injunction, and dissolved our temporary injunction. *Perales v. Meese,* 847 F.2d 55 (2d Cir. 1988) (per curiam). The INS has yet to

adjudicate the amnesty applications tendered while the temporary injunction was in effect.

On June 28, 1988, plaintiffs moved for partial summary judgment and the agency cross-moved. The district court, in an opinion dated March 29, 1989, granted plaintiffs' motions for intervention and class certification, but denied summary judgment motions to both sides. Plaintiffs moved for reargument on the facial invalidity of the challenged regulations. The parties settled this motion by a Stipulation and Order, filed July 21, 1989, which required defendants: (1) to publish amended regulations deleting the references to family members from the definition of public cash assistance and from the regulatory special rule; and (2) to reopen all timely filed applications that had been denied on public charge grounds and to readjudicate them in accordance with the amended regulations. The INS thereupon issued the July 1989 amendments discussed above. Upon readjudication, the INS approved all but one of the applications previously denied on public charge grounds.

The district court then held a six-day bench trial during which plaintiffs put in testimony from aliens, QDE representatives and immigrant advocates. INS officials also testified. The findings of the district court, as well as excerpts from the trial transcript, are reported in a thoughtful thirty-three page opinion at 762 F.Supp. 1036 (S.D.N.Y. 1991). In conclusion, the district court determined that the INS public charge regulations were neither facially invalid nor unlawful as applied. It further held that, even if plaintiffs had succeeded on the merits, under *INS v. Pangilinan*, 486 U.S. 875 (1988), a federal court would not have authority to compel the INS to open the application period to plaintiffs. This appeal followed.

DISCUSSION

I. *Subject Matter Jurisdiction.*

At the outset, we must decide whether we have subject matter jurisdiction in this case. In a letter to the district court, defendants originally conceded subject matter jurisdiction. However, shortly after oral argument on appeal, they raised the issue anew in light of the D.C. Circuit's recent opinion in *Ayuda v. Thornburgh,* 948 F.2d 742 (D.C. Cir. 1991). Plaintiffs contend that defendants' concession of jurisdiction forecloses its reconsideration.

The limited jurisdiction of federal courts is derived from the Constitution and the Congress, not from the consent of the parties. Therefore, a party cannot waive lack of subject matter jurisdiction, *see, e.g., Reale Intern., Inc. v. Federal Republic of Nigeria,* 647 F.2d 330, 331 (2d Cir. 1981), and the issue must be considered.

Federal question jurisdiction pursuant to 28 U.S.C. § 1331 would ordinarily cover the statutory and constitutional claims before us. *See, e.g., Morales v. Yeutter,* 952 F.2d 954, 957 (7th Cir. 1991); *Johnsrud v. Carter,* 620 F.2d 29, 31-32 (3d Cir. 1980). Defendants, however, urge that the IRCA's judicial review provisions are exclusive and deprive us of jurisdiction. *See* 8 U.S.C. § 1255a(f)(1)-(4) (1988). At the outset, we note the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary v. Haitian Refugee Center, Inc.,* 111 S. Ct. 888, 898 (1991); *see also Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986) ("[f]rom the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' ") (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967)).

The relevant review procedures set forth in § 1255a (f)(1)-(4) are as follows:

> **(1) Administrative and judicial review**
>
> There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.
>
> **(2) No review for late filings**
>
> No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.
>
> **(3) Administrative review**
>
> **(A) Single level of administrative appellate review**
>
> The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described paragraph (1) [*sic*].
>
> **(B) Standard for review**
>
> Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.
>
> **(4) Judicial review**
>
> **(A) Limitation to review of deportation**
>
> There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

A. *Do §§ 1255a(f)(1), (3) and (4) deprive this court of jurisdiction?*

The Supreme Court in *McNary, supra,* held that provisions codified at 8 U.S.C. §§ 1160(e)(1)-(3), which are identical to § 1255a(f)(1), (3) and (4) and govern judicial review of IRCA's Special Agricultural Worker (SAW) program, applied "only to review of denials of individual . . . applications" and not to "challenges to the procedures used by INS." *McNary,* 111 S. Ct. at 897. Each of the Court's reasons apply with equal force to §§ 1255a(f)(1), (3) and (4). The reference in § 1255a(f)(1) to "a determination" and in § 1255a(f)(4) to "a denial" limit the scope of these provisions to "single" application determinations and do not cover challenges to an INS "practice or procedure." *McNary,* 111 S. Ct. at 896. Section 1255a(f)(4)'s requirement that judicial review be "based solely on the administrative record" under an "abuse of discretion" standard is inappropriate for review of statutory or constitutional claims which are generally reviewed *de novo* by the courts. *Id.* at 896-97. Finally, if "Congress [had] intended the limited review provisions of . . . the INA to encompass challenges to INS procedures and practices, it could easily have used broader statutory language." *Id.*

at 897. Accordingly, *McNary* compels the conclusion that §§ 1255a(f)(1), (3) and (4) do not apply to the present challenge to INS procedures. *Accord Catholic Social Services v. Thornburgh*, 956 F.2d 914, 921 (9th Cir.), *cert. granted sub nom. Barr v. Catholic Social Services, Inc.*, No. 91-1826, ____ Sup. Ct. ____, 1992 WL 104771 (US, June 22, 1992); *cf. Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir. 1991).

Defendants contend that the D.C. Circuit's reasoning in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991), holding that § 1255a(f) deprived the court of jurisdiction to hear certain claims under IRCA, requires a different result. *Ayuda* reads *McNary* as drawing a distinction between true collateral challenges which are not covered by IRCA's exclusive review provisions, and claims that dress themselves up as "procedural" challenges but actually seeks to resolve the ultimate merits of an alien's application for adjustment of status which are covered. *Ayuda*, 948 F.2d at 749. We agree with the D.C. Circuit that the Supreme Court engaged in such line drawing so as to distinguish *Heckler v. Ringer*, 466 U.S. 602 (1984). *See McNary*, 111 S. Ct. at 897-98. *But see Catholic Social Services*, 956 F.2d at 921.

We disagree with *Ayuda*, however, insofar as it holds that a claim that unlawful INS procedures have deterred plaintiffs from filing applications is a claim which seeks to resolve the ultimate merits of an alien's application for adjustment of status. *See Ayuda*, 948 F.2d at 756-58. If plaintiffs succeed in obtaining an order from us to reopen the filing period as to them, they will still have to file timely applications and there is no guarantee that they will do so. Nor is there a guarantee that, if they do so, the applications will be granted. *Ayuda*'s assumption that plaintiffs "satisfy those other criteria so that they could present an otherwise 'prima facie application for adjustment of

status,' " *Ayuda*, 948 F.2d at 757 (quoting 8 U.S.C. § 1255a(e)(2) (1988)), may have been valid in that case, but in this one the most that can be said is that plaintiffs who will file will have reason to believe that their applications will not be denied on the grounds that they are "likely at any time to become a public charge." 8 U.S.C. § 1182 (a)(4) (Supp. II 1990). They may be wrong in this belief or their applications may be denied on other grounds in which case § 1255(f) review procedures will be their exclusive avenue of relief. Thus, even if we grant relief in this case, plaintiffs' success on the merits of their applications does not follow as a matter of course. We conclude, as did the Court in *McNary*, that the case before us presents a true "collateral challenge" and that

> [u]nlike the situation in *Heckler*, the individual respondents in this action do not seek a substantive declaration that they are entitled to [adjustment of] status. Nor would the fact that they prevail on the merits of their purportedly procedural objections have the effect of establishing their entitlement to [adjustment of] status. Rather, if allowed to prevail in this action, respondents would only be entitled to have . . . their applications reconsidered in light of the newly prescribed INS procedures.

McNary, 111 S. Ct. at 898.

B. *Does § 1255a(f)(2) deprive us of jurisdiction?*

Ayuda's denial of jurisdiction rested independently on § 1255a(f)(2), which has no identical twin in the statute considered in *McNary*. This provision provides that: "[n]o denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United

States Government." The D.C. Circuit found that § 1255 (f)(2) "could not in our opinion indicate more plainly that the district court has no power to order the INS to grant [a change of status] to aliens who failed to file applications on time." *Ayuda,* 948 F.2d at 758.

Section 1255a(f)(2) speaks of "*a* late filing of *an* application" (emphasis added). Following the Court's reasoning in *McNary,* we interpret this phrase as relating only to denials of individual applications and not to collateral challenges to a practice or procedure. *See McNary,* 111 S. Ct. at 896 ("[t]he critical words . . . describe the provision as referring only to review 'of *a determination* respecting *an application*' for SAW status. Significantly, the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure") (quoting 8 U.S.C. § 1160(e)(1)) (emphasis in *McNary*); *accord Catholic Social Services,* 956 F.2d at 920; *Doe v. Nelson,* 703 F.Supp. 713, 718 (N.D. Ill. 1988). Section 1255a(f)(2) thus does not cover the collateral challenge before us.

We further find § 1255a(f)(2) inapplicable because the INS has, as yet, denied no plaintiff's application on late filing grounds. Thus the triggering event, the "denial of adjustment of status . . . based on a late filing," has not occurred.

With respect to this point, the *Ayuda* court expressed concern that "aliens who missed the deadline could circumvent Congress' clear purpose of preventing them from coming to court after losing before the INS on this issue simply by going to court before filing with the agency." *Ayuda,* 948 F.2d at 758. This concern is not present here. Plaintiffs claim that they would have filed on time but for the INS practices under challenge and, as we shall explain below, individual plaintiffs will be required to demonstrate this in order to gain full relief. This action thus presents the question of whether *defendants* have cir-

cumvented a clear congressional purpose to provide a 12-month application period to qualified applicants, not whether plaintiffs have done so. *Cf. Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir. 1991).

Neither IRCA's plain language nor its legislative history suggests that Congress intended, in § 1255a(f)(2), to insulate from judicial review INS regulations which assertedly have the effect of shortening or eliminating altogether the statutory application period. The amnesty provisions as a whole, in fact, indicate that Congress placed great importance on the proper implementation of the application period: Congress specified that there should be a "12-month" period, 8 U.S.C. § 1255a(a)(1)(A) (1988); it made non-discretionary the Attorney General's duty to adjust the status of those who meet eligibility requirements, including the requirement of a timely application, 8 U.S.C. § 1255a(a) (1988); and IRCA's legislative history explained that aliens "have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars," and that the national interest lay in providing a "generous" amnesty program which included 12 months in which to apply. H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 49, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5,649, 5,653. These expressions of congressional purpose are consistent with judicial review of INS implementation of the application period. Given our presumption in favor of judicial review of agency action, we decline to read into § 1255a(f)(2) a congressional purpose to preclude review of the claim before us. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review [of agency action]." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

In sum, we hold that 8 U.S.C. §§ 1255a(f)(1)-(4) do not bar federal courts from reviewing the present action.

II. *Validity of the INS Public Charge Regulations.*

Turning to the merits, we consider plaintiffs' claim that the May 1, 1987 public charge regulations violated IRCA, the Administrative Procedure Act ("APA"), and the Fifth Amendment's guarantee of equal protection. Since we conclude herein that the regulations contravened IRCA throughout the one-year application period, we need not reach plaintiffs' APA and Fifth Amendment arguments, nor need we consider their challenge to the INS' dissemination policies.

A. *Do the public charge regulations violate IRCA?*

Under IRCA's Special Rule for Determination of Public Charge (the "statutory special rule"), an alien "is not ineligible for adjustment of status" on public charge grounds where she "demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). This provision requires an alien to show that she is *self*-supporting. The May 1, 1987 public charge regulations, on the other hand, excluded self-supporting aliens if they could not simultaneously support their families. In so doing, they violated the statute.

The May 1, 1987 regulations deemed "likely to become a public charge" any alien who fails to "demonstrate[ ] a history of employment in the United States evidencing self-support *without receipt of public cash assistance.*" 52 Fed. Reg. 16,211 (1987) (codified as amended at 8 C.F.R. § 245a.2(d)(4) (1992)) (emphasis added). Public cash assistance, however, meant "income or needs-based monetary assistance . . . received by the alien *or his or her immediate family members.*" 52 Fed. Reg. 16,209 (1987) (codified as amended at 8 C.F.R. § 245a.1(i) (1992)) (emphasis added). As the district court recognized, these pro-

visions would exclude a self-supporting alien whose *family member* received public assistance. *Perales,* 752 F.Supp. 1059-60. The district court nonetheless found the regulations valid on the grounds that self-supporting aliens with a family member on public assistance might yet be admitted under the agency's Special Rule for Determination of Public Charge (the "regulatory special rule"), 8 C.F.R. § 245a.2(k)(4). *Perales,* 762 F.Supp. at 1060. We disagree with this analysis for two reasons.

First, under the regulatory special rule an applicant who qualifies under the terms of the rule must then apply for a discretionary waiver from the Attorney General. *See* 52 Fed. Reg. 16,212 (1987) (codified as amended at 8 C.F.R. § 245a.2(k)(4) (1992)) ("An alien who has a consistent employment history which shows the ability to support himself and his or her family . . . *may be admissible under paragraph (k)(2) of this section* [providing for waivers of grounds of exclusion]") (emphasis added). The only apparent textual basis for this two-stage process is that the statutory special rule exists within a larger subsection entitled "Waiver of numerical limitations and certain grounds for exclusion." 8 U.S.C. § 1255a(d) (Supp. II 1990).

The body of the provision makes clear, however, that Congress intended to directly exempt from public charge excludability aliens who qualify under the statutory special rule, and did not contemplate an additional waiver requirement. To begin with, the statutory special rule's application to any "adjustment of status *under this section*" expressly extends its reach beyond the waiver subsection. *See* 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). More importantly, the statutory special rule instructs that a qualified applicant "*is* not ineligible" on public charge grounds. *Id.* No waiver is necessary. Rather, once the Attorney General finds a "history of employment evidencing

self-support" the statute precludes him from finding the applicant inadmissible on public charge grounds. Finally, had Congress merely intended the special rule to authorize waivers the provision would have been redundant. Other provisions already empowered the Attorney General to waive the public charge criterion for adjustment to temporary resident status. *See* 8 U.S.C. § 1255a(d)(2)(B)(i), (ii)(IV) (1988 & Supp. II 1990).

While we ordinarily accord deference to an agency's construction of the statute it administers, we need not do so where, as here, the text clearly establishes a contrary congressional intent.

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 & n.9 (1984) (citations omitted). Later changes in the INS position, culminating in the November 17, 1987 amendment excising the waiver requirement, *see* 52 Fed. Reg. 43,843 (Nov. 17, 1987) (codified at 8 C.F.R. § 245.2(k)(4) (1992)), strengthen this conclusion. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n.30 (1987); *Morton v. Ruiz,* 415 U.S. 199, 237 (1974). We accordingly find that the regulatory special rule's waiver requirement violated IRCA, and that the district court erred in concluding that the regulatory special rule saved the regulations. *Cf. INS v. Cardoza-Fonseca,* 480 U.S. 421, 443 (1987) (alien's right to remain in United States not equivalent to opportunity to gain asylum at Attorney General's discretion).

The regulatory special rule's deficiencies extended beyond the waiver issue and beyond November 17, 1987. As plaintiffs point out, the regulatory special rule *itself* looks impermissibly to an applicant's ability to support her family. Under the regulatory special rule, the public charge ground of exclusion would be lifted only for an applicant who could "show[ ] the ability to support himself *and his or her family* . . . [and] the capacity to exist on his or her income and *maintain his or her family* without recourse to public cash assistance." 52 Fed. Reg. 16,212 (1987) (codified as amended at 8 C.F.R. § 245a.2(k)(4) (emphasis added)). By demanding more from the applicant than a demonstration of *self*-support, the only required showing under the statute, the provision further violated IRCA.

The record reveals that the INS recognized this problem, albeit belatedly, and moved to correct it. The agency's July 1989 amendments removed all references to an alien's family from the regulatory special rule. 54 Fed. Reg. 29,442, 29,443-44 (July 12, 1989). Thereafter, the Federal Register notice instructed, "an applicant need[ed] only [to] demonstrate a consistent employment history that shows the ability to support *himself or herself.*" *Id.* (emphasis added). These amendments post-dated the May 4, 1988 cut-off date for applications. Thus we have no difficulty finding that the regulatory special rule contravened the statute throughout the 12-month application period.

Having so held, we note that our decision does not preclude the INS from *ever* attributing a family members' receipt of public assistance to the alien applicant. Where the child's public assistance is the family's only means of income the INS may reasonably conclude that the parent lives off of it. Indeed, IRCA's requirement that an alien show "self-support *without receipt of public cash assistance*" contemplates such a determination since, as plain-

tiffs concede, illegal aliens are not themselves eligible for public assistance. Having concluded that defendants may not exclude a self-supporting applicant based on her family member's receipt of cash assistance, we further hold that the INS may, in examining whether an applicant *is* self-supporting, consider whether she lives off her family member's cash assistance.

B. *Did the Agency Promulgate its Unlawful Regulations?*

Defendants argue that the post-May 4, 1987 policy memoranda discussed above more accurately reflected their policies as implemented than did the May 1, 1987 regulations. These policy memoranda, they contend, "did not represent any departure from the INS's public charge policies as the INS understood them at the inception of the amnesty filing period. Rather, the memoranda clarified the INS's policy by responding to questions from, and providing guidance to, the INS's four regional offices." Appellees' Brief at 48-49. We understand defendants to argue that, notwithstanding the confusing language of the May 1, 1987 regulations, their policies as they understood and implemented them were consistent with IRCA throughout the filing period and could not have unlawfully deterred plaintiffs' applications.

This argument is convincingly rebutted by documentation revealing that the INS disseminated the very aspects of the May 1, 1987 regulations which we have found unlawful. For example, plaintiffs' exhibit 54, entitled "The Public Charge Issue" and written by Richard Berryman, Chief Legalization Officer and Legalization Training Officer for New York, records the instructions conveyed at three regional staff trainings in April and May of 1987 and at a session for QDE's in Manhattan on July 24, 1987. In reference to the regulatory special rule, Officer Berryman stated that:

> In summary, 245A applicants for temporary residence who have received cash assistance because they were unable to support themselves *and/or their families* are subject to 212(a)(15) [the public charge exclusion]. They may *apply for a waiver* if the waiver criteria apply: family unity, humanitarian considerations and in the public interest. Most of the QDE representatives present indicated that most of their clients who had received welfare did so due to entitlements to their U.S. citizen children. I indicated that these applicants *should file a waiver.* (emphasis added).

This paragraph contains both of the policies for which we have found statutory authorization lacking: it looks to whether applicants are able to support their families; and, for those who satisfy the special rule, it conditions eligibility on satisfaction of the discretionary waiver process.

Other instances in which the INS disseminated its unlawful policies include an October 1, 1987 newsletter to QDEs which discusses the waiver requirement, and an update from the Eastern Regional Officer mailed on September 30, 1987 to local Legalization Offices reaffirming that a special rule applicant would "NEED CONSISTENT HISTORY OF EMPLOYMENT *TO MAINTAIN FAMILY*" (emphasis added).

Defendants cite only an October 15, 1987 issue of the National Center for Immigrant's Rights' *Legalization Update,* which states that

> [a]n INS agent at the RPF in Texas has apparently stated that welfare received by a U.S. citizen child of legalization eligible parents will not be considered in determining public charge excludability of the parents . . . Reports from other states, including New Mexico and New York, seem to indicate that INS may have adopted a similar policy.

This single perception of what policy the INS "may have adopted," when viewed against the substantial publicity going the other way, is insufficient to support defendants' claim that "the advocate community was aware that the INS was not imputing AFDC aid received by children to alien parents." The record as a whole convinces us that the unlawful May 1, 1987 regulations constituted official agency policy as communicated to aliens in New York State.

III. *Relief.*

Having found injury, we turn to the question of relief. Generally, federal courts can remedy unlawful agency action both through prohibitory injunctions, *see Youngstown Sheet & Tube Co. v. Sawyer,* 103 F.Supp. 569, 576 (D.D.C.) *aff'd* 343 U.S. 579 (1952), and mandatory injunctions, *see Carpet, Linoleum and Resilient Tile Layers v. Brown,* 656 F.2d 564, 567 (10th Cir. 1981); *Covelo Indian Community v. Watt,* 551 F.Supp. 366, 381 (D.D.C. 1982); *cf. Morales v. Yeutter,* 952 F.2d 954, 957 (7th Cir. 1991). Although plaintiffs also suggest equitable estoppel and equitable tolling, we need not consider these doctrines here. *See Lyng v. Payne,* 476 U.S. 926, 936 (1986). We do, however, address defendants' contention that *INS v. Pangilinan,* 486 U.S. 875 (1988), bars federal courts from extending IRCA's application deadline.

Pangilinan concerned the Nationality Act of 1940 ("Act") making citizenship available to those aliens who served honorably in the United States Armed Forces during World War II. The program operated in the Philippines from August 1945 to a December 31, 1946 cutoff date. However, in response to the Philippine government's complaints of a manpower drain, the INS withdrew its naturalization officer from that country for nine months

of that period. In 1948, Congress amended the Act to liberalize the citizenship program but specifically excluded Filipino servicemen from any further naturalization.

Nearly forty years after the expiration of the Act, sixteen Filipino nationals brought suit claiming that the nine-month hiatus violated the Act and that they were entitled to apply for and receive citizenship. Fourteen had taken no affirmative steps to be naturalized before the December 31, 1946 cutoff date. One had taken preliminary steps to obtain citizenship in the U.S. but did not complete his petition. The last had inquired at the American embassy before the cutoff date, but was told that there was no one there to assist him. The Ninth Circuit held for plaintiffs and, pursuant to its equitable powers, ordered their naturalization.

The Supreme Court reversed, holding that "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [congressional] limitations." *Pangilinan,* 486 U.S. at 885. The Court found that the December 31, 1946 cut-off date, coupled with the 1948 amendment specifically excluding Filipino servicemen from further naturalization, established a "congressional command." It held the Ninth Circuit's equitable powers insufficient to warrant the conferral of naturalization in the face of "a 'public policy established by Congress.' " *Id.* at 883 (quoting *INS v. Hibi,* 414 U.S. 5, 8 (1973)).

We find the circumstances of *Pangilinan* distinguishable from the present case. In *Pangilinan,* the plaintiffs faced two hurdles neither of which is present here. The relief they sought – naturalization – was beyond the court's authority since

> the power to make someone a citizen of the United States has not been conferred upon the federal courts,

> like mandamus or injunction, as one of their generally applicable equitable powers. *See, e.g.*, 28 U.S.C. § 1361; 28 U.S.C. § 1651. Rather, it has been given them as a specific function to be performed in strict compliance with the terms of an authorizing statute.

Pangilinan, 486 U.S. at 883-84. In this case, the plaintiffs seek only that we use our power to compel the INS to open its doors to their applications, with the chips thereafter to fall where they may.

Secondly, and ultimately determinative here, the mix of congressional purposes at issue are different from those in *Pangilinan* and thus, despite the surface similarities of the two cases, compel a different outcome. Defendants argue that IRCA's requirement that aliens apply "during the 12-month period beginning on a date . . . designated by the Attorney General," 8 U.S.C. § 1255a(a)(1)(A), establishes a May 4, 1988 "cutoff date" analogous to the Nationality Act's December 31, 1946 deadline and that Congress reaffirmed this cutoff by failing to pass a 1988 amendment to extend the filing deadline. Thus they contend that, as in *Pangilinan*, congressional policies bar us from extending the filing deadline. The district court agreed, holding that "[i]n refusing to accept applications beyond that deadline, INS is enforcing the public policy established by Congress. . . . Under the analysis of *Pangilinan*, we may not compel INS to accept applications for amnesty after May 8 [sic], 1988." *Perales*, 762 F.Supp. at 1067.

More recently, the Ninth Circuit, considering a similar request to extend the IRCA deadline, found that "[i]n IRCA, Congress did not provide a specific cutoff date for amnesty applications. The Act establishes a twelve-month period for aliens to apply for amnesty. 8 U.S.C. § 1255a (a)(1)(A). It does not contain a specific deadline." *Catholic*

Social Services, 956 F.2d at 922 (emphasis added). The court accordingly distinguished *Pangilinan* on the grounds that extending the deadline for those denied the full twelve months "effectuates, rather than frustrates, the public policy established by Congress." *Id.*

Briefly stated, we find the "cutoff date" versus "period" distinction an artificial one. While the Nationality Act of 1940 had a "cut-off date" of December 31, 1946, we might just as easily conclude that it described an application "period" of March, 1942 through December 31, 1946. *Pangilinan,* 486 U.S. at 877-79, 882. Similarly IRCA, as applied, fixed both a cutoff date of May 4, 1988, and a twelve-month application period. The question posed by *Pangilinan* is not whether IRCA establishes a cutoff date or an application period, but how to give recognition to the presence of both in light of congressional intent. More precisely, in this case we must determine whether, in the circumstances, extending the deadline to provide an effective twelve-month application period to aliens who would have applied in time but for unlawful INS actions would effectuate or undermine congressional intent.

In *Pangilinan,* the Court gave effect to congressional policies by enforcing the cutoff date. Congress, acting in response to the Philippine government's manpower drain complaint, had foreclosed *all* Filipino naturalizations after December 31, 1946. The amount of a given Filipino's access to the Act's original application period became irrelevant in light of the overriding congressional objectives which were served by strict observance of the Act's cutoff date. In failing to honor the cutoff, the Ninth Circuit's *Pangilinan* decision contravened expressed congressional will.

When carefully analyzed, however, the congressional purpose underlying IRCA leads us to a different conclusion than that reached in *Pangilinan.* At the outset, we

note that IRCA's amnesty program sprang from a competing set of congressional priorities. On the one hand, Congress desired to exclude the large number of undocumented aliens who, having entered the country in direct violation of our laws, were adversely impacting U.S. labor and the economy. H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 52, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5,649, 5,656. On the other hand, Congress acknowledged that "past failures to enforces [sic] the immigration laws have allowed [the aliens] to enter and to settle here," *id.* at 49, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5,649, 5,653, and that many long-term undocumented aliens had "contributed to the United States in myriad ways, including providing their talents, labor and tax dollars," *id.* Congress further recognized that enforcement as to all illegal aliens was a practical impossibility. As the House Report explained: "the alternative of intensifying interior enforcement or attempting mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage." *Id.*

IRCA balanced these competing concerns. Employer sanctions removed economic incentives for further illegal immigration. At the same time, the amnesty program gave aliens of long-standing residence a twelve-month opportunity to apply for citizenship while conditioning applications on rigorous eligibility criteria including the "unlikely to become a public charge" standard at issue here.

The length of the application period figured importantly in this balance. Given that aliens "live in fear" and are afraid to come forward, H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 49, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5,649, 5,653, integration of productive aliens required an ample application period during which they could come to understand the program. Consistent with this policy, Congress provided for the broad dissemi-

nation of information, 8 U.S.C. § 1255a(i) (1988), included a confidentiality provision, 8 U.S.C. § 1255a(c)(5) (1988), provided for QDE's to mediate between the aliens and the agency, and funded outreach services. Senator Simpson, a chief sponsor of the legislation, contending that aliens would come to understand the program, stressed the length of the application period: "each and every eligible alien will be aware of the requirements. There is enough time to do that—15 months—3 months after the date of enactment and then another year [i.e. the 12-month application period]." 129 Cong. Rec. 12,814 (1983). As Senator Cranston pointed out: "The whole purpose of having a legalization program—to bring some of the presently undocumented workers into the mainstream—is undercut if overly stringent procedures prevent vast numbers of aliens from qualifying and intimidate many others from even applying." *Id.* at 12,810.

The congressional goal of finality also necessitated a generous twelve-month period. As the House Report stated: "The Committee intends that the legalization program should be implemented in a liberal and generous fashion. . . . Such implementation is necessary to ensure true resolution of the problem and to ensure that the program will be a one-time-only program." H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 72, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5,649, 5,676. Senator Simpson similarly emphasized that "the legalization program is intended to be a one-time only, one-time shot, *and to be carried out carefully over a 15-month period.*" 129 Cong. Rec. 12,811 (1983) (emphasis added).

By dissuading aliens who would otherwise have applied, the unlawful public charge regulations thus conflicted with congressional desires to integrate productive aliens and to achieve finality, both of which goals were dependent on the full 12-month application period. Congressional intent

accordingly requires us to extend the filing deadline for such persons, so as to make effective the full twelve months. The present case is, in this respect, distinguishable from *Pangilinan* in which congressional policies required strict observance of the statutory cutoff date, but were indifferent to diminishment of the application period.[4]

Defendants assert that the 1988 failure of an amendment to extend the application period should change our analysis. Proponents of the amendment ventilated concerns that aliens had not come forward due to fear, *see* 134 Cong. Rec. 9,291, 9,295-96 (1988) (remarks of Senators Kennedy and Gore), and due to confusion over the program requirements, *id.* Defendants argue that the rejection of these arguments signals a congressional intent to preclude the relief plaintiffs seek.

We find the 1988 debates consistent with our understanding of earlier congressional policy. From the outset, Congress recognized that fear and confusion would impede the amnesty process. To address these concerns, it included a confidentiality provision, 8 U.S.C. § 1255a(c)(5) (1988), a generous twelve-month period, 8 U.S.C. § 1255a(a)(1)(A) (1988), and other safeguards. Yet it intended for the twelve-month period to be final, even for those who for its duration remained too confused or afraid to come forward. Congress expressed its desire for finality by making timeliness an eligibility *requirement,*

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[4] Congress' decision to leave the specific dates of IRCA's application period up to the Attorney General further evidences the relative insignificance of these dates. 8 U.S.C. § 1255a(a)(1)(A). The focus of legislative debate was instead on the *length* of the application period. While the House bill initially suggested an 18-month filing period, negotiations with the Senate led to the establishment of a "12-month period beginning on a date . . . designated by the Attorney General." *Id.*

8 U.S.C. § 1255a(a)(1)(A) (1988), and by precluding judicial or administrative review of individual denials for late filing, 8 U.S.C. § 1255a(f)(2) (1988). Legislators further made clear their belief that "legalization is an extraordinary benefit, an extraordinary grace" to which aliens have no entitlement if they fail to do their part in completing the application process. 129 Cong. Rec. 12,814 (1983) (remarks of Senator Simpson). Thus, whether we look to the 1988 debates, or the plain terms of the 1986 Act, we are convinced that aliens' fear or confusion could not now be grounds for extending the filing period.

At no point, however, did Congress intend to foreclose a remedy where unlawful *INS conduct* was the cause of aliens losing the benefit of the full twelve-month period. As early as 1983, Senator Simpson made clear that "[i]mplicit in these requirements and in this framework is the Committee's intent that the program be carried out firmly and fairly. . . . the legalization program is . . . to be carried out carefully over a 15-month period." 129 Cong. Rec. 12,811 (1983). Far from altering this conception, the 1988 debates reaffirmed Congress' expectation that there would be equitable remedies for those actually harmed by unlawful INS activity. Senator Grassley, an opponent of the amendment, remarked that:

> the proponents argue that certain court decisions recently handed down now make some 75,000 persons eligible for the legislation program. There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well equipped to evaluate equitable considerations. The Senate need not enact a broad extension to accommodate certain litigants.

134 Cong. Rec. 9,295 (1988). No opponent suggested otherwise. They limited their remarks to cases in which the

INS had acted lawfully. *See, e.g.*, 134 Cong. Rec. 9,293 (1983) (remarks of Senator Simpson) ("The INS went far beyond congressional requirements in publicizing this program. They went far beyond the requirements in publishing the regulations. . . . There is not a question out in the land people have not known exactly what we were doing here."). On this record, we conclude that neither in 1986, nor in 1988, did Congress intend to foreclose the availability of traditional equitable remedies for aliens who would have applied for amnesty but for unlawful INS regulations. To the extent that the unlawful public charge regulations eviscerated the application period for certain aliens, we effectuate congressional intent by extending the filing deadline to provide them with a fully effective twelve months.

IV. *The claims of the governmental plaintiffs.*

The district court apparently rejected the claims of plaintiffs New York City and New York State. These plaintiffs properly noticed their appeal, but have neither briefed nor argued the merits of their claims before us. We therefore remand these claims to the district court for reconsideration in light of this opinion.

V. *Order of Relief.*

We vacate the district court's judgment. On remand, we instruct the district court to provide permanent injunctive relief that will:

(1) Require defendants to disseminate, consistent with the terms of 8 U.S.C. § 1255a(i), information regarding the effect of this decision on illegal aliens who were living in New York State between May 5, 1987 and May 4, 1988.

(2) Enjoin defendants, for a one-year period following the issuance of the injunction, from refusing to accept

applications from members of plaintiffs' class for adjustment to temporary resident status, and require them to treat such applications as having been timely filed. In connection with the application, however, each applicant should be required to submit adequate proof that at some point prior to May 4, 1988 the applicant was aware of the policies contained in the INS' unlawful public charge regulations and that but for this awareness the applicant would have filed a timely application for adjustment of status. The failure to provide such proof may constitute an independent basis for denial of the application. After hearing the parties, the district court may determine the specific nature of the proof required. Individual INS determinations upon each application, including determinations as to the sufficiency of proof of deterrence, would then be subject to the review procedures specified at 8 U.S.C. § 1255a(f)(1)(3) and (4).

Finally, we note plaintiffs' request that defendants be required to reopen and readjudicate all New York State temporary resident status applications denied on public charge grounds. We agree that these applications should be readjudicated in accordance with the public charge regulations as amended in November of 1987 and July of 1989. However, we understand that this has already occurred pursuant to the July 21, 1989 Stipulation and Order. To the extent that any such applications have not been readjudicated pursuant to the Stipulation and Order the injunction should include relief to this effect.

CONCLUSION

We reverse the decision of the district court, and remand for further proceedings in accordance with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 2265 (KC)

CESAR A. PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ROBERT ABRAMS, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK, THE STATE OF NEW YORK, AND THE CITY OF NEW YORK,

AND

SARA DOE, JANE ROE, ANNE COE, INDIVIDUALLY, ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS

AND

FRAN FOE, MARY MOE, LINDA LOE, SUSAN SOE, AND ZELDA ZOE, INDIVIDUALLY, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFF-INTERVENORS

v.

RICHARD THORNBURGH, AS ATTORNEY GENERAL OF THE UNITED STATES, TERRANCE O'REILLY, AS ASSISTANT COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, EDWARD WILDBLOOD, AS LEGALIZATION DIRECTOR OF THE INS EASTERN REGIONAL OFFICE, GILBERT TABOR, AS INS EASTERN REGIONAL PROCESSING FACILITY DIRECTOR, SCOTT BLACKMAN, AS INS DISTRICT DIRECTOR OF THE NEW YORK DISTRICT, AND LOUIS SULLIVAN, AS SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANTS

OPINION AND ORDER

KENNETH CONBOY, District Judge:

This action was filed barely a month before the expiration of a one-year period of amnesty for undocumented aliens which had been authorized by the Congress in landmark immigration legislation. The plaintiffs here claim, in substance, that certain regulations issued by the Attorney General to implement the legislation were constitutionally and statutorily defective, causing a deprivation of their rights. Proceeding initially by order to show cause, they asked the Court to extend the deadline, notwithstanding the clear expression of the Congress – both in enacting the legislation and in later refusing to extend the deadline – that the rights conferred by the statute would expire on May 4, 1988. This we declined to do, ruling that, under the doctrines of equitable tolling and constructive filing, the plaintiffs could obtain the relief being sought if they could establish at trial the merits of their attack on the regulations and either affirmative misconduct by the Government or sufficiently concrete and definitive steps taken by the plaintiff aliens to apply for the benefits *before* the expiration of the filing deadline. A trial having been had, we conclude, principally, that plaintiffs have failed to establish the merits of their statutory and regulatory claims. Even if those claims were established, plaintiffs have not shown either affirmative misconduct by the Government, which would permit application of the doctrine of equitable tolling of the deadline, or constructive filing by the alien plaintiffs before the expiration of the deadline. We now elaborate upon these conclusions.

This class action challenges certain aspects of the administration by the Immigration and Naturalization Service ("INS") of the legalization program created by the Immigration Reform and Control Act of 1986, Title II, § 201(a),

Pub. L. No. 99-603, 100 Stat. 3394 *et seq.* ("IRCA", "the Statute", or "the Act"), codified primarily at Section 245a of the Immigration and Nationality Act of 1952, as amended ("INA"), 8 U.S.C. § 1255a (1988). The regulations in question relate to the "public charge" ground of exclusion from the legalization program. Generally, if an applicant was found to be likely to become a public charge, he could be found ineligible for the benefits created by the statute. Plaintiffs—individual aliens, class representatives, and governmental entities—allege that INS's public charge regulations were unlawfully restrictive, that INS disseminated these defective regulatory standards to the public, and that, as a result, eligible aliens disqualified themselves from the legalization program. Plaintiffs allege violations of IRCA, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 552 *et seq.* (1986),[1] and the Fifth Amendment to the United States Constitution. Plaintiffs seek declaratory, injunctive and mandamus relief.

The Government denies these allegations, disputes the justiciability of this action, the standing of the governmental plaintiffs, and the Court's subject matter jurisdiction, and maintains that the Court does not have the authority to grant the relief sought by the plaintiffs.

After pretrial proceedings, described below, the case was tried without a jury from October 9 through October 17, 1990. The parties filed post-trial briefs on December 5, 1990, and further letter advice on February 22, 1991. This

[1] Although a violation of the APA is conclusorily alleged in the complaint, plaintiffs have not pursued this allegation, either in pretrial proceedings or at trial, focussing instead on the alleged violations of IRCA and the Constitution. Accordingly, we deem plaintiffs to have abandoned this theory of liability, and we do not address it further.

opinion and order constitutes the Court's findings of fact and conclusions of law.

I. *Statutory and Regulatory Background*

IRCA became law on November 6, 1986. It was the result of a protracted and complex national debate on immigration policy that acknowledged the existence in this country of a large population of undocumented aliens and the pervasive impact of this population upon America's agricultural economy, migrant labor conditions, and urban landscape. Ever growing social welfare expenditures by states, like New York, California, Texas and Florida, with large concentrations of illegal aliens, were a significant factor in developing the political consensus that led to the passage of the legislation. In essence, the statute sought to deal a) with illegal aliens already in the country, by giving them a one-year amnesty period to qualify for lawful status, thereby drawing them out of outlaw status and an economic and legal no-man's land, and b) with future illegal aliens, by making it unlawful for United States employers to hire undocumented persons who are not legally authorized to work, thereby creating disincentives to future migration. American agricultural workers stood to benefit from this new policy because they would no longer lose jobs to illegal aliens laboring at sub-standard wages. Another beneficiary would be American cities and counties, whose social welfare obligations to a large alien constituency would decrease as aliens surfaced and joined the mainstream economy or declined to immigrate because of a shrinking job market.

The statute established a legalization program for qualified aliens who had resided in the United States unlawfully since before January 1, 1982, and required the Attorney General to designate a twelve-month period during which

prospective legalization applicants could apply for legalization. 8 U.S.C. § 1255a(a)(1)(A). Because the Congress required the Attorney General to start the twelve-month application period on a date not later than 180 days after November 6, 1986, *id.*, it appears that Congress intended to foreclose any applications for benefits filed after May 4, 1988. The Attorney General designated May 5, 1987, through May 4, 1988 as the twelve-month application period. 8 C.F.R. § 245a.2(a)(1).

Congress specified certain formal requirements that an applicant for legalization had to satisfy. Under IRCA, an illegal alien could adjust his status to that of a lawful permanent resident if he could prove that he had: (1) made a timely application, (2) resided in the United States since before January 1, 1982, (3) resided here continuously since the enactment of the statute in November 1986, and (4) was admissible as an immigrant. 8 U.S.C. § 1255a(a)(1)-(4). As is customary, Congress delegated to the Attorney General authority to issue detailed regulations that would govern implementation of the Act. 8 U.S.C. § 1255a(g)(1).

During the long Congressional debate that preceded enactment of IRCA, advocacy groups for the alien population argued that, because of mistrust of the INS endemic in the immigrant population, a buffer had to be created between the alien and the Government if the legalization program was to succeed. Accordingly, to facilitate its effort to reach the large number of potential but hidden beneficiaries of IRCA, INS certified, pursuant to 8 U.S.C. § 1255a(c) & (i), approximately twelve hundred private organizations as "Qualified Designated Entities" ("QDEs"). They were classified in two categories: "National Coordinating Agencies" ("NCAs") and "Direct Service Providers" ("DSPs").

INS entered into a written agreement with each NCA which required the NCA to cooperate and coordinate with

INS in the training of DSPs, both initially and on an as-needed basis, to provide technical assistance to DSP sites, to distribute public information materials prepared by the INS for the legalization program, to participate in the INS Outreach training program and to provide instruction to non-affiliated Service Providers and other community organizations as necessary. INS also entered into a written agreement with each DSP which required the DSP to distribute forms and provide information regarding legalization eligibility requirements to interested persons, to review legalization applications and assist prospective legalization claimants, and to publicize the availability of the DSPs' services through local media, churches, schools and community organizations.

These written agreements with the QDEs contemplated that the INS would provide technical training and assistance to DSPs; provide, initially and on an as-needed basis, formal training sessions and materials to NCAs, their affiliates and independent DSPs; and monitor the quality of the services being provided through the QDEs. INS certified over sixty organizations in New York State as QDEs.

Beginning on January 20, 1987, INS issued and disseminated to the public the regulations that would govern eligibility for legalization, including a "public charge" ground of exclusion from the legalization program. These public charge regulations are at the heart of this case.

IRCA's requirement that legalization candidates be "admissible as immigrants," 8 U.S.C. § 1255a(a)(4), refers to and incorporates the exclusion provisions of Section 212(a) of the Immigration and Nationality Act of 1952, as amended ("INA"). One class of aliens not "admissible as immigrants" under INA Section 212(a) is the class of aliens who, "in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges." Section 212(a)(15) of the INA, 8

U.S.C. § 1182(a)(15). Thus, Congress's requirement in IRCA that a legalization applicant prove that he is "admissible as an immigrant," 8 U.S.C. § 1255a(a)(4), requires the Attorney General or his designee to make a determination regarding an alien's ability to be self-supporting in the United States.

For IRCA legalization applicants, Congress also created certain exceptions to the general provisions of 8 U.S.C. § 1182(a)(15) and provided a "Special Rule for Determination of Public Charge" (the "Special Rule"). The Special Rule states:

> An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(15) of this title [the "public charge" exclusion] if the alien demonstrates a history of employment in the United States evidencing *self-support* without receipt of public cash assistance.

8 U.S.C. § 1255a(d)(2)(B)(iii) (emphasis added). In addition, Congress provided that the Attorney General could waive the public charge ground of exclusion "in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1255a(d)(2)(B)(i).

As required by the statute, 8 U.S.C. § 1255a(g)(1)(B), and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, the INS promulgated regulations to implement IRCA. A Notice of Proposed Rule Making was published in the Federal Register on March 19, 1987, 52 Fed. Reg. 8752 *et seq.* (1987), and final regulations were published on May 1, 1987, 52 Fed. Reg. 16205 *et seq.* (1987), codified at 8 C.F.R. § 245a. These regulations, *inter alia,* defined the criteria used by the INS to evaluate an alien's ability to demonstrate that he would not become a public charge if granted temporary residence.

The IRCA implementing regulation headed "proof of financial responsibility" provided:

> An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the [INA] . . . unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section [to establish proof of the requisite period of continuous residence necessary to qualify for legalization under IRCA] will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment.

8 C.F.R. § 245a.2(d)(4) (1987).

The regulations implementing IRCA's Special Rule (see *supra* at 9) provided:

> An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible under paragraph (k)(2) of this section [relating to waivers of grounds of exclusion under 8 U.S.C. § 1255a(d)(2)(B)(i)]. The alien's employment history . . . should be continuous in the sense that the alien shall be regularly attached to the work force, has an income over a substantial period of the applicable time, and has demonstrated

> capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

52 Fed. Reg. 16212 (May 1, 1987), codified at 8 C.F.R. § 245a.2(k)(4) (1987). In November 1987, this regulation was amended to eliminate the reference to waivers under paragraph (k)(2). 52 Fed. Reg. 43844 (November 17, 1987).

"Public cash assistance" was defined by the regulations as:

> income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family through federal, state, or local programs designed to meet subsistence levels.

8 C.F.R. § 245a.1(i) (1988).

Just before the amnesty program began, the INS, responding to comments, inquiries, and criticisms of its proposed public charge regulations, emphasized that "applicants *may* in fact be ineligible for legalization if such cash assistance was received by their U.S. citizen children." 52 Fed. Reg. 16207 (May 1, 1987) (emphasis added).

On September 23, 1987, in a memorandum entitled "Guidelines for Determining Public Charge Issues under Legislative Provisions of the Immigration Reform and

Control Act of 1985 (IRCA)", the INS promulgated further relevant guidelines:

> Proof of financial responsibility under 8 C.F.R. § 245a.2(d)(4) is to be established by examining *the totality of the alien's circumstances* at the time of his or her application for legalization. The existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, income and vocation.

Pl. Ex. 9 (memorandum dated September 23, 1987, from Richard E. Norton, Associate Commissioner, to Regional Commissioners).

On October 1, 1987, the INS issued a memorandum providing an example of when a waiver of the public charge provision might be available for those not otherwise eligible for qualification under the "Special Rule":

> Waivers may be accepted in the case of applicants who have had extenuating circumstances which necessitated reliance on public cash assistance in the past, but for whom the likelihood of relying on public cash assistance in the future appears non-existent.

Pl. Ex. 11 (memorandum entitled "Waivers, Section 212(a)(15)", dated October 1, 1987, from Richard E. Norton, Associate Commissioner of INS to Edward J. Wildblood, Regional Legalization Officer of the Eastern Region).

On November 23, 1987 INS addressed the issue of public cash assistance paid to an applicant's family members in the form of Supplemental Security Income ("SSI") benefits:

> For purposes of evaluating proof of financial responsibility under 8 C.F.R. § 245a.2(d)(4), SSI

> should be considered as public cash assistance only with regard to the person who receives it. SSI should not be attributed as public cash assistance to the immediate family members who reside with the recipient but who themselves are non-recipients.

Pl. Ex. 14 (memorandum dated November 23, 1987, from INS Associate Commissioner Richard E. Norton to INS Regional Commissioners).

On February 12, 1988, Assistant INS Commissioner William S. Slattery, in a letter to John M. Payne, a senior official of the Department of Human Services of the District of Columbia (the "Slattery letter"), addressed the question of whether receipt of Aid to Families With Dependent Children ("AFDC") benefits would render an applicant ineligible for legalization. He wrote, "Public charge status is not conveyed to the parent-payee *if the United States citizen child is the recipient.*" Pl. Ex. 18 (emphasis added). On February 26, 1988, INS Commissioner Alan C. Nelson wrote to Ruth Massinga and Marlin Johnson of the American Public Welfare Association ("APWA") and repeated the advice that receipt of AFDC benefits by a child would not render a parent ineligible for legalization. Pl. Ex. 20.

II. *Prior Proceedings in this Action*

Plaintiffs filed their complaint on April 1, 1988, approximately one month prior to the expiration of the deadline for filing amnesty applications. The complaint[2] asserts that INS "adopted and published unlawfully restrictive regulations on the so-called 'public charge' ground of exclusion," Complt. ¶ 4, that "unlawfully classified

[2] References are to the First Amended Class Action Complaint, filed on March 15, 1990.

thousands of economically productive, self-supporting aliens as 'likely to become public charges'—and excluded them from legalization—merely because the aliens' citizen or permanent resident dependents lawfully receive or have received public assistance." Complt. ¶ 6. The complaint further alleges that the "challenged regulations directly contravene the Immigration Reform and Control Act, which expressly provides that an alien must *not* be denied legalization on 'public charge' grounds if she or he can demonstrate the capacity for *self*-support." Complt. ¶ 8 (citing 8 U.S.C. §§ 1255a(a), 1255a(d)(2)(B)(iii)). The complaint goes on to assert that, as early as December 1987, high INS officials took the internal position—contrary to INS's published regulations—that the receipt of public cash assistance by the U.S. citizen children of an undocumented alien is not relevant to the determination of the alien's eligibility for legalization. Complt. ¶ 13. The complaint then makes reference to the aforementioned February 12, 1988, letter of Commissioner Slattery. *Id.* Finally, the complaint alleges that INS's failure to amend its unlawful "public charge" regulations or otherwise notify the public of the "altered eligibility standards" evidenced by the Slattery letter unfairly deterred large numbers of qualified aliens from filing for legalization. Complt. ¶ 18.

The individual plaintiffs sought to represent a class composed of:

> (a) all undocumented aliens residing in New York State who may be excludable from the Legalization Program established by [IRCA] as "likely to become public charges" based in whole or in part upon the receipt of public cash assistance by the applicants' U.S. citizen or legal permanent resident dependents, and (b) all undocumented aliens residing in New York

> State who either failed to apply for legalization by May 4, 1988, or who abandoned their applications, because they believed that they were ineligible on "public charge" grounds.

Complt. ¶ 28. This class of similarly situated aliens assertedly exceeds five hundred in number. Complt. ¶ 29.

Plaintiffs sought immediate injunctive relief, including judicial extension of the May 4, 1988 filing deadline, the promulgation and publication of clarified regulations on the relevance of AFDC assistance to public charge determination, and the ordering of INS to accept legalization applications from affected aliens for a full twelve-month period following publication of the clarified regulations in the Federal Register.

After several hearings on the matter, the Court, on April 19, 1988, obtained the Government's commitment to publish formally, on a nationwide basis, the substance of the Slattery formulation of the AFDC/public charge issue. We declined on that date to issue the temporary restraining order requested by the plaintiffs. Order dated April 19, 1988.

Two days later, on April 21, 1988, INS Associate Commissioner Norton distributed to all regional offices across the country a detailed and formal memorandum on the effect of the receipt of AFDC benefits on eligibility for legalization. The purpose of the memorandum was to "reiterate the policy" on the matter. Pl. Ex. 25. It stated as follows:

> As a general rule, the receipt of AFDC benefits by a member of the legalization applicant's family is not attributed to the applicant for purposes of determining the likelihood that the applicant will become a public charge. . . . If, however, the family is reliant on the AFDC benefits as its sole means of support,

> the legalization applicant may be considered to have received public cash assistance. This determination must be made on a case by case basis and upon consideration of the totality of the applicant's circumstances.

Id.

The plaintiffs nonetheless pressed for a preliminary injunction on the ground that the clarification came too late in the amnesty period to benefit those who, but for reliance on the assertedly misleading published regulations, would have sought legalization status. In other words, plaintiffs argued that members of their class, whose United States born children had received AFDC benefits, had self-disqualified themselves on the mistaken belief that such benefits operated to disqualify them automatically as likely to become a public charge, despite the totality of circumstances, the Special Rule and the availability of a waiver.

We denied plaintiffs' application for a preliminary injunction, concluding that "the rights of all the parties can be adequately protected through a systematic and fact oriented trial on the merits, followed by the exercise of the administrative authority of the Commissioner [of INS] and the equitable power of the Court if the record justifies it." Order dated April 26, 1988. In so ruling, the Court invited the plaintiffs to demonstrate that each had constructively filed an application for legalization *prior* to the May 4, 1988 deadline by taking some definitive steps to pursue legalization, but had not formally applied because of misinformation about "public charge" regulations wrongfully given to them by INS. We further invited those who could not show constructive filing to demonstrate a right to an equitable tolling of the May 4, 1988 deadline based upon Government misconduct. On May 19, 1988 the Court of

Appeals affirmed the denial of the preliminary injunction. 847 F.2d 55 (2d Cir. 1988).

On May 17, 1988, three pseudonymous individuals filed motions to intervene in this case. Unlike the original individual plaintiffs, these aliens did not file applications before the May 4, 1988 deadline. In June 1988, the same three moved for a preliminary injunction compelling the INS to grant them work authorizations pending the outcome of the case. The motion was withdrawn after INS agreed to provide temporary work authorizations to the three proposed intervenors. On June 28, 1988, plaintiffs moved for partial summary judgment declaring that 1) defendants' "public charge" regulations facially violate IRCA and the Equal Protection component of the 5th Amendment, 2) defendants' failure to disseminate accurate eligibility standards, their shifting interpretations of the public charge standards, and their issuance of misleading and ambiguous regulations violated the Due Process clause of the 5th Amendment and IRCA, and 3) members of the proposed class who can show that they were deterred from applying for amnesty are entitled to equitable tolling of the May 4 deadline. The INS cross-moved for summary judgment dismissing the complaint. Subsequently, plaintiffs moved, pursuant to Fed. R. Civ. P. 23(b), for certification of the class defined in the complaint (see *supra* at 14). By order dated March 29, 1989 we denied the motions for summary judgment and granted the motions for intervention and class certification.

III. *The Trial*

A. The Alien Witnesses

The plaintiffs called seven alien witnesses, six of whom were class members.

Connie Loe testified that she was born in El Salvador, had lived in the United States for nine years, and had

obtained permanent residence status through the amnesty program. Tr. 356.[3] She stated that she had heard the amnesty program discussed on radio station WADO and television channel 41 or 47,[4] and went to an organization known as the Concerned Citizens of Queens, a QDE, with her children other than her daughter, Linda Loe, to pursue amnesty. Tr. 357-360. Her daughter Linda did not "attend to her appointments at Concerned Citizens of Queens" because "we had heard that parents whose children had received welfare could not apply for amnesty," Tr. 360, and Linda's U.S. citizen children had received welfare. Connie Loe had heard this, shortly after the amnesty period began, on a WADO radio program, on which a representative of the "Immigration Department" answered phoned-in questions from the public. It was then that she heard this person state that "people whose children were on welfare could not apply for amnesty." Furthermore, this person, who was a woman, said nothing about a waiver. Tr. 361-62. Ms. Loe testified that she telephoned her daughter Linda that day and told her "that possibly she [Linda] could not apply for amnesty because her [Linda's] children were receiving public assistance." At Concerned Citizens of Queens, Connie Loe discussed her daughter Linda's case with "the person who was helping me fill out my application," and "asked him whether my daughter whose children were receiving public assistance could apply and he said no." Tr. 363. She was referred to a lawyer at that point, a Ms. Zambrana, and was told that her daughter could not "apply for amnesty" unless she took her children off welfare. No mention was made of a waiver. Ms. Connie Loe then relayed this information to her daughter Linda. Tr. 364-65.

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[3] References to the Trial Transcript will be cited as Tr. ___.

[4] Radio station WADO and television channels 41 and 47 are Spanish-language stations.

On cross-examination, Connie Loe stated that references she had seen in the Spanish language newspaper *El Diario* to the receipt of welfare issue did not contain any interviews or statements of government officials. Tr. 371. She further stated that neither she nor her daughter Linda ever contacted anybody at INS about Linda's eligibility for amnesty. Tr. 373. When asked whether she would have advised her daughter to pursue amnesty if there was a possibility of approval in spite of having children on welfare, Ms. Loe said she would have advised it only if amnesty "had been guaranteed." Tr. 376. The reason for this position, the witness explained, was her fear that her daughter could be deported based upon submitting an amnesty application. She communicated this fear to her daughter, and Linda "was afraid she would be deported if she applied." Tr. 377. The witness did not assert that this egregiously false information,[5] so sadly at odds with the central message of the national amnesty campaign promoted by the Government and the QDEs, came from any Government official or QDE functionary.

Linda Loe, daughter of Connie Loe, testified that she was born in El Salvador and has four children, all of whom were born in New York; that she came to the United States in 1980 and married an American citizen in 1982; that she left her husband in 1984; and that, from that time until May 1988, she was almost always employed. Tr. 384-87. She stated that though her children have received public cash assistance, she herself has never received it. Tr. 388. Ms. Loe further stated that she had heard, on a call-in television program on channel 41 or 47, a male representative of the Immigration Service state that a parent whose

[5] IRCA's confidentiality provision, 8 U.S.C. § 1255a(c)(5), prevents the INS from using the information furnished pursuant to an amnesty application in deportation proceedings.

children were receiving public assistance could not apply for amnesty. Tr. 391. She stated that she also heard this on radio station WADO, at about the same time. Tr. 392. At this point she asked her mother to inquire about the matter at the Concerned Citizens of Queens. After being advised by her mother of the negative advice from the Concerned Citizens, she went there herself in October or November 1987. Tr. 394-95. The witness stated, "I spoke to the receptionist and asked her to speak to the lawyer to see whether I could get some information [and was told] that in order to speak with the lawyer, I had to pay a certain amount in order to get the information." Tr. 395. She did not do so "since I had already obtained the same information from the same place." Tr. 395. At about the same time, she also spoke on the telephone for "about half an hour" with a representative of the City of New York and was told "I could not apply for amnesty, if I had some other way out or some way to apply for papers, okay. But I could not get amnesty." Tr. 396.

On cross-examination, Ms. Loe conceded that she never spoke with anyone at INS about her problem. Tr. 399. She further asserted that in her telephone conversation with the New York City representative she was told that she could be deported based upon her application for amnesty. Tr. 402. Based upon that advice and like information from "family members" and "people sometimes close to [her]," she feared deportation. Tr. 401.

Maria P. testified that she was born in the Dominican Republic, entered the country illegally across the Texas border, has been living in the United States for ten years, has two United States born children, and had been employed for most of the period between her entry into the country and May 1988. Tr. 407-10. She said she had not applied for amnesty "[b]ecause my daughter was receiving public assistance and they were saying that people whose

children were receiving public assistance could not apply." Tr. 411. When asked who told her that, she said "The news and people who were talking. At that time a lot of people were talking and I heard a lot of them say that." *Id.* When her attention was directed to a Mr. Julio Hernandez, the witness stated that in July 1987 she went to his Church and was advised by him "that I couldn't apply [for amnesty] because I had my little girl on public assistance." Tr. 412. He gave her this advice "frequently". Tr. 413. On cross-examination, Maria P. stated that she did not make further inquiry of anyone. Tr. 415-16.

Jenny C. testified that she was born in Colombia, entered the United States illegally through San Diego, has lived here nine years, has one child who was born in New York, and was employed for all but a year of the period since her arrival in the United States. Tr. 422-24. She knew of the amnesty program, but did not apply "[b]ecause I began to hear people saying that all people who were receiving public assistance could not apply." Tr. 424. She stated that in May 1987 she heard a journalist say on Channel 41 that "those persons who had arrived before '82 had a right to apply, but those that had received public assistance did not have a right to apply." Tr. 425. On radio station WADO, she heard another journalist say "something like the fellow said on television, that any person who received public assistance could not apply." Tr. 426. She heard the same thing from an unidentified friend speaking in the street who showed her an INS printed notice, Pl. Ex. 30, which advised *temporary* residents under the IRCA program that, to achieve *permanent* residence, the applicant must not receive certain types of public cash assistance and must not become a public charge. Tr. 427-28. After this conversation with her friend, she did not seek advice from anybody about whether or not she might be eligible for amnesty "because

that paper was from immigration so I was sure that I could not apply." Tr. 428. The public assistance benefits she received were Medicaid and Women, Infants and Children ("WIC"), in connection with her pregnancy. Tr. 429. On cross-examination, Jenny C. conceded that she never tried to contact anybody from the government for clarification on her eligibility for amnesty. Tr. 434-35. Nor, although she was aware of the existence of community organizations assisting in the amnesty program, did she seek clarification from those sources. Tr. 435.

Sonia R. testified that she was born in Honduras, has lived in the United States for almost ten years, and has one American born child. She crossed the United States border illegally into Nogales, Arizona. Tr. 442-43. For all but five months up until May 1988, Sonia R. was employed. Tr. 444. Because she "had already had assistance"—she had received Medicaid and WIC benefits in connection with her pregnancy—she did not apply for amnesty. Tr. 445. She based her decision on a program she heard on Channel 41 "before people applied . . . before they started the applications." Tr. 445. The program included, among others, representatives of the "Department of Immigration". Tr. 446. According to Sonia R., a caller stated he or she was receiving assistance and "the person" on the program said that such persons could not apply. Tr. 447. She stated that the only affirmative step she took to pursue her interest in the amnesty program was to go to a law school in Brooklyn, but the record is unclear as to what transpired as a result of this visit. Tr. 447-48. On cross-examination, the witness conceded that she never sought clarification on the issue of receiving public assistance from any government official. Tr. 455.

Rosa C. testified that she was born in Santo Domingo, came into the United States illegally at San Diego, has lived here since 1981, and is the parent of two New York

born children. Tr. 457. She has been largely self-supporting, and, although she knew of the amnesty program, she did not apply "because people were saying that people who were receiving assistance for their children could not apply." Tr. 459-60. She heard this on Channel 47 or 41, on which a person from the Immigration Service appeared. "Someone called in and asked whether persons whose children were receiving public assistance would qualify and he [the representative from the Immigration Service] answered no." Tr. 461. No further explanation was given on this topic. Tr. 462. She also heard advice to the same effect on an unspecified radio program. Tr. 462-63. On cross-examination, Ms. C. conceded that she had not spoken to anybody about her amnesty program, even though she knew that various community organizations existed to help people file applications for amnesty. Tr. 466. Nor did she ever contact the INS. Tr. 470.

Miriam B. was born in Trinidad, entered the United States legally on a visa but remained beyond her authorized stay, and is the parent of two children born here. She has been in large measure self-supporting since her arrival in the country. She testified that she did not apply for amnesty because she had seen a television program on Channel 7 on which there were, among others, "people from the Immigration Department. . . . The program was a panel discussion and they said that persons who received welfare for their children were not eligible. . . . Everybody [on the program] agreed that that was the case." Tr. 477. Ms. B. later went to a Catholic organization in Englewood, New Jersey and spoke to a nun there. "I asked her if my son received welfare, if I was eligible for the amnesty program, and she told me no." Miriam B. then went to a private lawyer, who told her she could not qualify for amnesty because "her son was on welfare." Tr. 478-82. Finally, Miriam B. spoke to a priest at a Catholic organi-

zation in a church in Harlem, and he told her she was ineligible "because my son received welfare." She was also told that "my chances of getting [amnesty] with the waiver was like the same thing, next to nothing." Tr. 483.

B. INS Witnesses

Terrance O'Reilly testified that, at the time of the amnesty program, he was Deputy Assistant Commissioner for Legalization under IRCA. To advise the public through the radio, television and print media about the standards and benefits of IRCA, INS paid $10.6 million to public relations firms. Tr. 765. It enlisted the support of the American Immigration Lawyers Association, the American Bar Association, a National Coordinating Agency for voluntary groups across the country, and the National QDEs. Press conferences and seminars were routinely held and organized. Tr. 766. Flyers, fact sheets, posters, bill inserts, transit ads, balloons, buttons and radio tapes were produced and distributed on a multilingual basis during the amnesty period. Gov. Ex. L. A national toll-free hotline was set up to disseminate application information. Tr. 767.

The QDEs, numbering approximately 1200 nationwide, were created under the statute to act as a buffer betwee the INS and the alien population, but in fact 75% of all applicants during the amnesty period applied directly to INS rather than through the QDEs or private attorneys. Tr. 767-68. When asked to explain this, Mr. O'Reilly testified:

> It is our belief at central office that we tried to have a very fair, very open program. And we felt that if we could get the people to trust us at INS, that we weren't running a big sting operation, that they would come directly to us. Once we started working the people through the process and once people started getting

> out on the street with the temporary residence cards and went out and showed their buddies that hey, look what I got from INS, it seemed to work real well. People believed us. They believed their friends. So the population started coming directly to us.

Tr. 768. INS opened 107 legalization offices nationwide, and four regional processing centers. Tr. 768-69.

Commissioner O'Reilly testified that it was never INS's policy to consider receipt of public cash assistance by an applicant's immediate family members, citizen family members, as rendering the applicant automatically ineligible for legalization. Tr. 773. He went on to explain that "if there was receipt of any sort of assistance by the citizen child, we viewed that at central office as a tool that should be used to maybe look further at whether or not this alien may be likely to become a public charge [in the future]. More as an indicator that there may be some questions about this person's financial responsibility." Tr. 774. This policy was disseminated by the Service throughout the nation. *Id.*

When asked to review Pl. Ex. 9, the Norton memorandum of September 23, 1987, see *supra* at 11-12, Commissioner O'Reilly testified that it did not in any way represent a change in the regulations, but was merely a clarification containing more specific guidance for INS's regional offices. Tr. 774-75. He further indicated that Pl. Ex. 14, the Norton memorandum of November 23, 1987, see *supra* at 12, also did not alter, but merely clarified, the regulations. Tr. 776. He testified to the same effect with respect to Pl. Ex. 25, the Norton memorandum of April 21, 1988, see *supra* at 15-16. Tr. 776. He also asserted that Pl. Ex. 18, the Slattery letter of February 12, 1988 to John M. Payne, see *supra* at 13, reflected no deviation from or modification of the Service's policy regarding the effect of receipt of AFDC funds on legalization. Tr. 780-81.

The legalization program received approximately 1.76 million applications during the one-year entitlement period. The planning assumptions and expectations of INS prior to the opening of the amnesty period was for 2 million applications. Thus, this represented an 88% response rate. In March 1988, the Service announced that, as of April 4, 1988, it would accept skeletal applications *without* documentation and issue immediate work authorizations, to afford all possible applicants an opportunity to meet the May 4 deadline, with an additional 60 days *post*-deadline to assemble and complete the application. Gov. Ex. O. This announcement received broad national media attention and resulted in the filing of 170,000 applications during the last three days of the program. Tr. 786. On cross-examination, Commissioner O'Reilly admitted that Pl. Ex. 18, the Slattery letter, could be interpreted as a change in policy. Nevertheless, the Commissioner maintained that, throughout the amnesty period, the public charge determination was based on the totality of the circumstances. Tr. 801.

Mr. O'Reilly's superior, William Slattery, the Assistant Commissioner for Legalization during the relevant period, had a major administrative role in organizing the Service's national effort to disseminate information and stimulate large numbers of applications. Tr. 820, 822-824. He took sixty-three trips during the one-year application period, including one to the Dominican Republic, during which he did seventeen television shows. He rode an elephant in the Washington, D.C. St. Patrick's Day Parade, and marched in Brooklyn's West Indian Day Parade. In New York, he did "a lot of Irish radio, [interviews with] ethnic newspapers [and three appearances] on Asian T.V. in New York". Tr. 825.

Commissioner Slattery's testimony on the QDEs' role in actually persuading aliens to come forward and file appli-

cations is sufficiently instructive to warrant quotation at length:

> Q. And could you explain a little bit what your involvement with the QDEs and NCAs was?
>
> A. The QDEs is an abbreviation for Qualified Designated Entities. And this is nomenclature which didn't exist or at least not to my knowledge before the passage of IRCA. It was created in the Immigration Reform and Control Act. Most of the individuals that became known as QDEs were previously either NCAs or volunteer agencies. And they came into existence, my understanding is, based upon representations that they had made that the aliens would not deal directly with the government, that there needed to be an intermediary, a buffer. As a result, they were provided for in the statute.
>
> There was a role provided for them in the statute whereby they would perform that function. They would be an intermediary between the alien population and the INS. So as a result, I had to meet with them because they were going to perform a role whereby they could receive applications from the aliens and then deliver the applications to the INS.
>
> Indeed, at the beginning of the program, they had represented to the INS—I don't know what they represented to the Congress—they certainly represented to the INS that they had millions of aliens already pre-registered for the benefit. So they had already had contact with them. They had already established a way of communicating with them and that they were prepared to bring these people in to INS for the benefit.
>
> It was in my best interest to meet with them since they had the pool of beneficiaries.

Q. Was that representation with respect to millions of applicants ever made directly to you?

A. Yes, yes, absolutely. When I would meet with them initially, I started meeting every week and then later on it was every two weeks, and eventually I think once a month. But the representations of the numbers were made two fold: One, when they met with me, they would talk about the numbers of people they had and two, many of them put a request in for advanced funding. Just as I had to borrow $125 million from the appropriated funds of the Immigration Service to start and to get up to where I could do business, they came to the Immigration Service and they asked for advanced funding.

I don't remember how much money each one asked for, but the largest one was U.S. Catholic Conference. They asked for 1.2 million based upon a dollar per head for everybody they already had registered. So they put a written request in and told us they had 1.2 million people lined up and they wanted that advance. They were to pay it back off when they submitted an application. The QDEs were going to generate about $15 or $16 per application. We were going to deduct one dollar for every application we paid them for until we got the $1.2 million back. That application went to Mr. Duarte.

After a good deal of discussion, they granted Catholic Conference $800,000. They said, "We are not quite sure you have got 1.2 million. Based upon what you are giving us, we will give you $800,000."

Q. Was that Mr. Duarte when you say "they granted"?

A. Yes, and I believe he worked with Mr. Norton on it. I wasn't involved in that grant. $800,000 did go out as start up to Catholic Conference.

THE COURT: How many ultimately did the U.S. Catholic Conference process for the INS?

THE WITNESS: They failed miserably, but I think it was less than 100,000.

THE COURT: What kind of representations were made when the Catholic Conference said it had 1.2 million? What documentation was submitted to support that?

THE WITNESS: I don't know the quality of the documentation or the degree of the documentation, but they represented these individuals were all pre-registered with the Catholic Conference.

THE COURT: A pre-register implies a record of some kind?

THE WITNESS: Yes, I can only tell you that Monsignor de Marzio was head of The Catholic Conference nationwide. And after we advanced this money and the aliens, the numbers didn't come in. By midsummer the media campaign was getting ready to kick in and I had grave concerns that the QDEs were not going to be able to produce that which they had represented they could produce.

If indeed Monsignor de Marzio – just to use him as an example – had 1.2 million people in the pipeline, there was no advantage to me to pay millions of dollars on an alien campaign to see Monsignor de Marzio. He couldn't bring them in the office. Even if he had 3 million people, he couldn't get them in and I had a payroll to meet before the end of the fiscal year.

I decided I had to go to the alien population and tell them to come to the Immigration Service. I told the commissioner that we were going to fail if I didn't reach out to the alien public directly. He gave me the

green light; and in the first advertisement campaign that went out, it went out late July of 1987 and it did not mention the QDE participation in the program at all.

We reached right out to the alien community and told them to see us. They started coming in in droves. By August, 1987, Monsignor de Marzio came in and had a meeting with Mr. Norton and he told him I stole all of his clients. I found that a bit unusual because total receipts for the entire country at that time only amounted to 400,000 aliens by August of 1987. So if I stole all of this, I should have at least 1.2 million. That is, if they were represented by Catholic Conference. He said he was going out of business because I stole his clients and I guess he was right. He did go out of business. They only produced about a hundred thousand for the whole program.

Q. You stated INS provided start-up funds for QDEs. Did Congress require the INS to provide funds to QDEs?

A. I don't believe so, no.

THE COURT: Let me see, I don't want to drop this issue of pre-registration. Are you aware of any records that Catholic Conference or indeed any other QDE created and conceivably might be available in connection with this lawsuit that would demonstrate that persons came forward in the numbers claimed? Did the conference submit with its application for the 1.2 million any documentation as to the persons they had lined up?

THE WITNESS: I never saw the application, Your Honor, because it wasn't submitted to me. It was submitted to Mr. Duarte and I don't know the degree of

specificity required to request the funds or if they just took them basically at their word. I never saw the application. I never saw the documentation supporting it. I do know that the request was made for $1.2 million and the service granted $800,000.

THE COURT: Largely on just as you understand it, the oral warranty or promise by this organization that it did indeed have at least 800,000 persons pre-registered implies that they had actually had contact with 800,000 aliens?

THE WITNESS: That is correct. From my own understanding of the situation was when we started out—I believe possibly improperly now—that when they were talking these types of numbers, they had a name and a contact, phone number or address that they had already interviewed somebody and they thought they had an applicant. It turns out that the quality of pre-registration was not quite that high. It might have been somebody saying, "By the way, is there going to be an amnesty program? If so, I might be interested."

"And how many kinds do you have?"

"I have ten." They would chalk off ten pre-registered with no vehicle to ever contact again in the future. I think that is how it turned out. But they never were able to come up with names or anything else. This was an excuse used not just be The Catholic Conference. I don't mean to identify just them. They were the biggest one.

The other QDE's all represented to have people in the pipeline too. And when we would meet, we, the service, as I said earlier, my interests were in bringing enough people in the door especially in the first four months to pay back the money I borrowed. Their in-

terest seemed to lie more in the area of advocacy. They weren't interested in production. They were interested in advocating certain issues.

And so we would meet and I would want to talk about where are the aliens? And they would want to talk about issues. The end result was after jawboning for two or three months, I had to do it myself. I had to push them aside and reach out to the alien community.

THE COURT: You mentioned earlier that Congress had stipulated quite concretely in the statute a role for the QDEs. What in substance was that statutory role?

THE WITNESS: I don't remember the language of the statute right now, but as I understand it, they were to be an intermediary between the aliens and us. There was to be a role for them. I think Congress gave them a role because they wanted a role. They certainly didn't work for me. They weren't an arm of the Immigration Service.

THE COURT: What was the role?

THE WITNESS: Well—

THE COURT: What did you understand the role to be?

THE WITNESS: I understood the role was an end result of an argument put forth by them that the alien community was afraid to deal directly with the Immigration Service, that there had to be a middleman, someone whom the alien community could trust. That was them. They could receive the application from the alien. The alien would not be in contact with an official of the government. And then they could de-

liver the application to the government, and for that they would get a fee.

THE COURT: So the theory was that the QDE was to in effect collect the application, safeguard it, and forward it to protect that alien's rights?

THE WITNESS: That is correct.

THE COURT: Your view is as this program evolved that isn't principally what they did? They essentially got into policy debates?

THE WITNESS: It was not even essentially. It was from day one. It was advocating policy issues. They looked to the service, for example, through the regulatory process to substitute our judgment for that of the Congress. I can give you all kinds of examples.

THE COURT: That is sufficient.

Tr. 825-33.

Commissioner Slattery further testified:

Q. Were you ever informed that QDEs at any of these meetings that you participated in by representatives of QDEs and NCAs that their field offices were holding applications and not submitting them to the INS?

A. When I met with the QDEs, that seemed to be the message they were giving me at the meetings. And it was for a variety of reasons. In other words, if you would come up and say that ineligible family members can remain in the United States, we can get you applications if you will reduce the documentary requirements necessary to support an application. We get you applications.

So the implied threat was: Change your standards and we will get you the applications. They seemed to

be motivated or driven by the fact that they almost wanted a guaranteed pre-approval before they gave you the application. They did not want to risk a denial. Even when the program started running and we were showing something like a 97 or 98 percent approval rate, they were still hesitant to say they would submit an application until they were pretty much assured of a grant.

Q. Do you recall if the issue of public charge was raised as one of the reasons why the QDEs and NCAs were holding applications?

A. I don't remember, no.

Q. At any time during the meetings that you had with the representatives of the QDEs and NCAs, did you tell them that they should submit the applications that they were holding?

A. Absolutely.

Q. Why was that?

A. One I needed them. I needed a lot of applications. I wanted them to submit everything they had. I was satisfied in the integrity of the program that our goal was to look for a way to grant these cases as opposed to deny them. We intended to be very liberal in our adjudication. I think our end result establishes that position. We had a 90 something percent approval rate. We were just encouraging them and trying to show them that they were imagining more problems than what really existed in the program.

If they submit applications, they will see. We will approve them. Start submitting and we will grant them and they will get a feel as it goes out. They seem to want guarantees beforehand, before they would give us an application.

Tr. 838-40.

John O'Malley, an information officer for INS in New York during the legalization campaign, appeared on Channels 41 and 47 and on other television and radio programs as a spokesperson for the Service in its outreach efforts to the alien population in this area. Tr. 658-59. In the course of dealing with the public charge issue at such public or media forums, the witness stated that he would not have asserted that an alien whose United States citizen children were receiving welfare benefits did not qualify for legalization, because to have done so would have been inconsistent with the regulations that he was very familiar with and with the training he had received. Tr. 672-73. Nor did he ever say that waivers were not available for aliens who were found excludable on the basis of being determined likely to become a public charge. Tr. 674-75. He stated that during the year he made 210 appearances on radio, television and at public meetings.

Richard Berryman, who served as INS's legalization officer for the amnesty program in Hempstead, Long Island during the application period, Tr. 695, conducted a two-week training session for INS personnel in April 1987 on legalization procedures in Burlington, Vermont. Tr. 700-02. He later became INS district coordinator for training. Tr. 704.

He described the process of interviewing an applicant as it might have implicated the public charge ground of exclusion:

> Q. Now, with respect to the interview process, would public charge exclusion grounds be one of the topics that was discussed or explored at that interview?
>
> A. Yes, if the person indicated that he had received public cash assistance, it was on the back page of the application. And if he indicated that, the adjudicator

would explore that saying, "Did you receive public cash assistance?" Or "In what form was it?" For example, some people thought food stamps were public cash assistance and it was not. Many people thought that. Some applicants thought that certain medical benefits that they had gotten constituted public cash assistance and it did not. So adjudicators would explore any grounds of inadmissibility that the alien checked off.

In the course of adjudicating the application, one of the eligibility criteria was financial responsibility. And the alien had to demonstrate that he or she was attached to the work force and did not receive public cash assistance, was able to support him or herself without recourse to public cash assistance. The supporting documentation was examined also to see that the alien had met that burden of proof. For example, if there were a year or certain amount of time after 1982 up until the time of the interview that the alien could not show that he or she was employed or getting income from somewhere, then the adjudicator would generally dwell on that and say, "There is a gap here. How did you support yourself during this period of time?"

We did not require documents for every single month of every single year. We were looking for a total picture of a person. Maybe he worked off the books. Not a proof of payment which was the case in a number of the applications that we saw, then the adjudicator was supposed to make a judgment. What is the totality of the picture here? Was this person able to support him or herself during this period of time?

Q. If an applicant indicated that they had in fact received public assistance over a fixed period of time

during the relevant period, would that have automatically rendered them ineligible for legalization?

A. No, we were not allowed to disqualify anybody on that because it wasn't a grounds of statutory denial. If a person was inadmissible under one of the grounds of exclusion that could not be waived, then we would issue a local denial.

In the case you mentioned if it were public charge, we would indicate to the person the availability of a waiver and the necessity of applying for a waiver. And if it were granted, the application could be approved. Could be.

Q. Now, were these recommended denials or grants binding in any way upon the regional processing facility or the RPF?

A. No, the regional processing facility could overturn a local recommendation of grant or denial. So they were not binding in any manner or form, no. May I just expand on that? The regional processing facility was supposed to obtain the results of the fingerprint check that the alien applied for. The regional processing facility was also to get the results of a criminal background check and if there were another INS file in existence for an alien, the regional processing facility would get that other file and see if that file contained any information that had bearing on the legalization case.

We did not have the full picture on the local level. We made our recommendations based on what the alien had indicated on the application, what supporting documentation the alien had submitted, and on the judgment of the adjudicator in applying the applicable statute and regulations. But the RPF also had

access to this other material and they would wait for any of that material and make a final decision.

Q. Mr. Berryman, I would like to go back for a second. I believe you indicated that in the case of a specific applicant who had received public cash assistance over a fixed period of time, that that would not result in an automatic finding of ineligibility. Would that have resulted in automatic recommendation for denial by the local office?

A. It would have. Yes, I have to explain that. If a person were inadmissible and a waiver were submitted or if the alien were told that a waiver were submitted, we would check or remedy a file and the adjudicator was told to articulate on the worksheet that the alien was informed that waiver was available, the waiver is attached, or as part of the application, or that the alien was informed that a waiver is available, was given form I-690 and told to mail it to the regional processing facility.

The reason to check denial was to flag down that application because at one stage, they were spot checking all recommended grants. But any recommendation denial was automatically flagged down for further RPF examination and final determination.

Q. Now, I would like for you to distinguish if you can between the circumstance you just described and one in which an alien applicant's United States citizen child received public cash assistance? Would under that second scenario, would that have resulted in automatic recommendation for denial by the local office?

A. No, I think in that instance, the adjudicator would explore how the alien met the burden of proof

for financial responsibility. If there were a problem in that, during that time, the alien had to rely on public cash assistance to support himself and his or her family during the time, we would recommend a waiver at that time. This was before the special rule procedures were clarified.

Q. And subsequent to the clarification of the special rule procedures, would there have been any other different result?

A. Yes, if the adjudicator were convinced that the person fell under the provisions of the special rule, we would not require a waiver be submitted, and the adjudicator would so indicate on the worksheet – on the write-up on the worksheet – that the special rule applied. My judgment is that the special rule applies in this case. No waiver requested. Probably he would recommend a grant.

Tr. 710-15.

Mr. Berryman stated that at a training session involving one QDE in July of 1987, *before* the technical amendments of the regulations governing IRCA, he did, as reflected on page five of Pl. Ex. 54, state the following:

> In summary, 245A applicants for temporary residence who have received cash assistance because they were unable to support themselves and/or their families are subject to 212(a)(15). They may apply for a waiver if the waiver criteria apply: family unity, humanitarian considerations and in the public interest. Most of the QDE representatives present indicated that most of their clients who had received welfare did so due to entitlements to their U.S. citizen children. I indicated that these applicants should file a waiver because the family unity issue allowed for this and I saw no reason why such a waiver would not be viewed favorably by the Service.

Tr. 724. He indicated that subsequent to the technical amendments, however, his understanding changed: if the Special Rule applied, no waiver was needed. Tr. 725.

Mr. Berryman further testified that Pl. Ex. 54 was not disseminated to anyone outside INS, and that Pl. Exs. 31 and 60 were never disseminated to the QDEs by the INS. Tr. 727, 737-38. He confirmed that information relating to the public charge question as reflected in the INS training documents marked as Gov. Exs. F and G was in fact disseminated in QDE training sessions held in September 1987. Tr. 728-730. Finally, he stated that QDEs had no adjudicatory role in the process, but were merely to serve as a referral source, and that this was unequivocally communicated to them in the governing contracts (Pl. Ex. 38) and the training sessions. Tr. 735-37.

C. The QDE Witnesses

The plaintiffs presented the testimony of four QDE representatives: Marco Mason, Haydee Zambrana, Rachel Miller, and Heidi Schoedel. Plaintiffs produced these witnesses to establish that INS had broadly misled or at least confused the QDEs on the public charge issue as it related to AFDC payments to U.S. born children of IRCA applicants. We will not reference this testimony at length, as we found it generally not especially precise, even-handed or persuasive. What their testimony revealed is a striking unwillingness to deal with the language of the controlling regulations, a disposition to find only categorical certainty where qualification and condition obtain, and a reluctance to acknowledge the QDE role in the program as defined by statute, contract and instruction. One cannot, for example, read the testimony of Dr. Marco Mason, the director of the Caribbean Immigration Center, without concluding that his credibility is severely damaged by gen-

eralizations, equivocation and ignorance. Furthermore, his organization produced no documentation to support his criticism of the INS procedures. Tr. 109-169.

Haydee Zambrana, who worked at the Concerned Citizens of Queens, testified that she could not recall if she had ever read the final IRCA implementing regulations, and she did not know if she ever read any regulations after May 4, 1987 or what portion she had read of the version that she did see. Tr. 215-16. With respect to her responsibilities toward the alien applicants whom fate placed in her care, she said that she "rejected" those whose applications raised questions as to the public charge issue. Tr. 218. She dealt with applicants who were employed but whose United States born children were receiving public cash assistance, and she "rejected" them, too. Tr. 219-20. She did not recall if she ever read the Special Rule provision but "assumed" that she had, and could not remember if she referred any questions about the public charge criteria to her organization's supervising attorney. Tr. 220-25. She could not recall reading the waiver provisions either. Tr. 226. She admitted that she was the official of her QDE who signed its agreement with the INS but could not remember if she advised "rejected" aliens of the availability of waivers, despite her organization's obligation under the agreement to do so when advising aliens who were likely to be rejected by the INS on public charge grounds. Tr. 231-32; Pl. Ex. 38 at ¶ 4.7. She also asserted that she could not recall seeing Section 245a(c)(3) of the Act, IRCA's prohibition of adjudication of amnesty claims by QDEs, but after reading it, agreed that it applied to QDEs. Tr. 228-29.

Rachel Miller testified that she worked at two QDEs during the amnesty program, the Chinatown Planning Council and the Traveler's Aid Service, and received training from the INS on the IRCA program. Tr. 332-36. She

instructed her staff at the latter organization that the receipt of public cash assistance by an applicant or his family was not a "good sign", and that it would require that an amnesty application be accompanied by a separate waiver application. Tr. 339-40. Traveler's Aid, however, never filed such a waiver request for an applicant whose citizen children were receiving public cash assistance, Tr. 342, and indeed, she was aware of only one applicant in this category, whose case was referred to outside counsel. She was unaware of any such cases coming into the organization on its hotline. Tr. 343.

Heidi Schoedel testified that during the amnesty program she was legalization director for the World Relief Corporation, certified by INS as a National Coordinating Agency. She conceded that whatever ambiguity World Relief found in the AFDC issue was dissipated in March 1988, at least two full months prior to the amnesty deadline, when she learned of the Slattery letter to John Baine. Tr. 602-04.

D. The Non-QDE Alien Advocates

The Non-QDE immigrant advocates called by the plaintiffs, Darlene Kalke, Julio Hernandez, Margaret McManus, Carmen Olmeda and Irene Leacock, gave a body of testimony that in substance establishes that the organizations represented had little or no direct contact with the INS, read the regulations with varying degrees of acuity and completeness, and gave advice to applicants on the public charge issue based largely upon a generalized understanding of that exclusion ground among those in the immigration advocate community. Reading this testimony, one is struck by the incoherence and disorganization that characterized the formal operations of these organizations. This is most strikingly true on the subject

of the waiver, and the amazing indifference to the need for careful recordkeeping.

Darlene Kalke was executive director of the Center for Immigrant Rights during the legalization program. Most unfortunately, this organization seemed to have been wholly oblivious to the potential damage that its pseudo-policies could do to the rights of individual alien applicants, especially because, under IRCA, there was no negative consequence (other than the loss of the filing fee[6]) that could befall an applicant whose amnesty petition was turned down. Ms. Kalke admitted that she held alien applications until the advocates "could change the regulations", and blamed this course upon a Legal Aid attorney remembered only as "Kathleen". Tr. 26-29.

Julio Hernandez of the Northern Manhattan Coalition for Human Rights asserted that he was told by Mr. Byrnes of INS in the fall of 1987 and the spring of 1988 that AFDC benefits to a citizen child of a parent *then* unemployed would disqualify the parent. Tr. 54. Mr. Byrnes testified that he had no recollection of such meetings. Tr. 643-44.

Margaret McManus, of the Volunteers of Legal Services, conceded that throughout the amnesty program, the regulations consistently provided for a "totality of the circumstances" test for determining an alien's proof of financial responsibility, that is, that he or she was not likely to become a public charge. Tr. 93-95; Pl. Exs. 9 and 25. She also conceded that neither of these Norton memoranda contained a *per se* public charge exclusion rule. Tr. 101-03.

Carmen Olmeda, a lawyer, worked at the Housing Workshop in the Bronx as a legal representative during

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[6] Congress directed the Attorney General to provide for a schedule of fees to be charged for the filing of applications for amnesty. 8 U.S.C. § 1255a(c)(7)(A). The schedule of fees is codified at 8 C.F.R. § 103.7(b)(1) (Forms I-687 and I-690).

the amnesty program. She testified about a potential applicant whom she discussed with a "dark-skinned" male with a foreign accent at the legalization office of INS. This applicant had a continuous work history but was at the time unemployed for three months and had received two welfare checks on behalf of her citizen children. According to Ms. Olmeda, the "dark-skinned" male said that the applicant "was considered a public charge". Tr. 175-177. We can only observe that this kind of testimony, submitted *by a lawyer* who asserts that she was fully familiar with the full range of IRCA eligibility criteria and regulations, borders on the ludicrous. We are referred to no case file, no case analysis, no date, no identifiable official and no contemporaneous documentation. Obviously, this anecdotal proof, against which the Government cannot defend, is not especially probative and is entitled to very little, if any, weight.

Finally, Irene Leacock, the Executive Director of the Committee for Nicaragua Refugee Aid, testified that she was told by Ms. Zambrana, identified earlier, that alien parents whose citizen children were receiving welfare could not become legalized and that she was advising prospective applicants that they could not qualify for amnesty. Tr. 565-66. Ms. Leacock in turn trained others in her organization and some volunteers from Hostos Community College that illegal aliens with welfare dependent children could not be legalized. She said the same thing in media appearances. Tr. 572.

E. Local Welfare Official Witnesses

Plaintiffs also offered the testimony of three local welfare officials from the District of Columbia, New York and Texas. It is quite clear that these states, and presumably others, had strong policy disagreements with INS on

the public charge issue. These states and the District of Columbia have large illegal alien populations who routinely received, before and after the passage of IRCA, local welfare support. Despite their broad and direct contact with these alien populations, the bureaucracies of these states apparently did little to encourage these potential IRCA beneficiaries to go to INS and work out, on the ad hoc basis—considering the special circumstances, unique conditions, and personal history of each alien—contemplated by the statute and the regulations, the "likely to become a public charge" assessment. Rather, the states spent their energy, and the precious and limited time of the amnesty period, in petitioning INS for general and blanket assurances that welfare benefits available in a home with citizen children would, absolutely and categorically, be excluded from the "likelihood" assessment, even where the parent was unemployed or the AFDC benefits were being used by the parent. It is not surprising, given this dogmatic and, it must be said, simplistic approach, that all three local officials who testified conceded that the Special Rule and waiver provisions of the regulations played little or no role in their interaction with and advice given to the alien populations in their jurisdictions.

Ms. Gayle Smith of the District of Columbia, for example, did not give advice to her agency's staff on the waiver provisions, even though she had an understanding of those provisions, because her agency was concerned with not discussing the "intricacies" of the legalization process with prospective applicants. Tr. 243-44, 264-66. Indeed, Robert Sharkey, a New York official, testified that the State's Department of Social Services undertook to warn welfare applicants that receipt of AFDC benefits by themselves or by their children might jeopardize their legalization prospects, even though the agency was unsure of the effect of such benefit receipt and wanted a further explanation of

those regulations. Tr. 296, 312, 330-31. It is clear that the New York agency resented the INS's reluctance to furnish advisory opinions about the impact on amnesty claims of specific welfare benefits. Tr. 306-10, 313. Diane Stewart, of the Texas Department of Human Services, ridiculed the INS's outreach efforts during the amnesty period, saying all that INS had done was to "put notices on tamale packages and a few other things," Tr. 543, and yet neither she nor her agency recommended to any prospective legalization applicant to go and speak directly with INS because she did not want "to be trying to advise [welfare] recipients." Tr. 539.

IV. *Analysis*

A. Threshold Issues

In its letter of February 21, 1991, the Government has conceded, as it must, that the Court has subject matter jurisdiction over this case. *See McNary v. Haitian Refugee Center,* 111 S. Ct. 888 (1991).

The Government argues that the claims of the three original plaintiffs, Doe, Roe and Coe, who filed legalization applications prior to the expiration of the May 4, 1988 deadline, are either moot or non-justiciable because (1) they have been accorded temporary resident status, and (2) on July 12, 1989, the INS amended the IRCA regulations to provide explicitly that public cash assistance received by an alien's immediate family cannot be imputed to the alien for purposes of determining whether or not the alien is likely to become a public charge. These plaintiffs disagree, asserting that, at the time they apply for adjustment from temporary to permanent resident status, they "will again be subject to scrutiny under whatever public charge policy INS *may* have in effect at that time". Complt. ¶¶ 152, 157 and 162 (emphasis added). Although we are strongly in-

clined to agree with the Government that this claim is highly speculative and that in any case plaintiffs may be required to exhaust their remedies at the INS, we nonetheless decline to so rule in light of our disposition of the case.

The Government further asserts that the claims of the plaintiff-intervenors, Foe, Moe, Loe, Soe and Zoe, none of whom have filed legalization applications, are premature and not yet ripe for adjudication. The same argument is made against the broad class they represent. This argument simply makes no sense in light of the nature of the injury complained of here, that is, that these aliens were prevented or dissuaded from filing for amnesty because of assertedly defective and unlawful regulatory and promotional procedures of the INS under the Act. Plaintiffs are entitled to seek redress from this Court by challenging the INS's regulations and procedures, without first having to file an application and be denied amnesty or having to wait for the INS to begin deportation proceedings. *Cf. McNary*, 111 S. Ct. at 898 (requiring aliens denied "Special Agricultural Worker" status to surrender themselves voluntarily in order to obtain judicial review is "tantamount to a complete denial of judicial review").

The last of the Government's threshold arguments is that the state and city plaintiffs lack standing to sue on behalf of their citizens because neither states nor local governments have *parens patriae* standing to sue the Federal Government. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 & n. 16 (1982); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). The Government further argues that these plaintiffs do not have standing to sue by reason of any alleged injury to themselves, in that they have not shown any actual or threatened injury to New York State or New York City as a consequence of the alleged illegal conduct of INS. While the Government has a strong argument on both grounds,

it is unnecessary to decide this issue because the non-governmental plaintiffs have standing. *See United States Department of Labor v. Tripplett*, 110 S. Ct. 1428, 1431 (1990); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

B. The Merits

Our inquiry is threefold: (1) have the plaintiffs established that the INS's public charge regulations are inconsistent with IRCA; (2) have the plaintiffs established that the INS disseminated misinformation concerning its public charge regulations in violation of IRCA and the Due Process clause of the Constitution; and if so, (3) does the Court have the power to grant the relief sought.

1. Are INS's Public Charge regulations inconsistent with IRCA?

a. Standard of review

We begin with a classic restatement of the basic principle:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent to Congress. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permis-

> sible construction of the statute. [fn: The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.]

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (citations and one footnote omitted). "If Congress has explicitly left a gap for the agency to fill . . . legislative regulations [promulgated pursuant to the statute] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44 (citations omitted). If the delegation of rule-making authority is implicit rather than explicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* (citations omitted).

Section 1255a(g)(B) of IRCA directs the Attorney General to "prescribe . . . such . . . regulations as may be necessary to carry out this section." Additionally, Section 212(a) of the 1952 Act explicitly grants the Attorney General the authority to decide whether, and upon what grounds, an alien is likely to become a public charge. Thus, INS's interpretation of IRCA's "admissible as an immigrant" provision is entitled to a high degree of deference.

We do not think INS's "Special Rule" regulation is entitled to the same deference as the "public charge" regulation. Unlike the "public charge" provision, which clearly gives INS discretion in determining admissibility requirements, the Special Rule provision of IRCA may be read to reflect explicit Congressional intent with little room for flexibility in interpretation on the part of INS. The Rule

provides that, "if the alien demonstrates a history of employment in the United States evidencing *self-support* without receipt of public cash assistance", he is eligible for adjustment of status. 8 U.S.C. § 1255a(d)(2)(B)(iii) (emphasis added). INS's "Special Rule" regulation, 8 C.F.R. § 245a.2(k)(4), however, incorporates INS's definition of "public cash assistance" as any "needs-based monetary assistance . . . received by the alien or *his or her family members.*" 8 C.F.R. 245a.1(i) (emphasis added). Coupled with Congress's clear intent that IRCA be implemented in a liberal and generous fashion,[7] plaintiffs' contention that INS's "Special Rule" regulation is too restrictive is not insubstantial.

Moreover, as we have noted, INS has announced certain clarifications of its interpretation of IRCA's "public charge" and "Special Rule" provisions since its implementing regulations were first issued. "An agency's interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n. 30 (1987) (quoting *Watt v. Alaska,* 451 U.S. 259, 273 (1981)). *See also Barnett v. Weinberger,* 818 F.2d 953, 960-61 & n. 74 (D.C. Cir. 1987) ("prestige of a statutory construction"

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[7] Congress intended the legalization program to be "implement[ed] in a liberal and generous fashion." H.R. Rep. No. 682 (Part I), 99th Cong., 2d Sess. 72, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5676 (hereinafter, "House Report"). Congress also "expect[ed] the INS to incorporate flexibility into the standards for legalization eligibility." House Report at 73. *See also* 130 Cong. Rec. H5908 (daily ed. June 15, 1984) (statement of Rep. Brown) (purpose of Special Rule for public charge determination was "to incorporate in the language of the bill a provision which demonstrates *more flexibility than we have historically had in connection with the application of the immigration law*") (emphasis added).

by agency depends crucially upon whether it was promulgated contemporaneously with enactment of statute and has been adhered to consistently over time); *Jordan v. Lyng*, 659 F. Supp. 1403, 1416 (E.D. Va. 1987) (fact that agency's statutory interpretation has been neither consistent nor longstanding substantially diminishes deference to which it is entitled in interpretation of statute); *Oregon Dep't of Human Resources v. Heckler*, 651 F. Supp. 6, 9 (D.C. Or. 1984) (district court would not defer to agency's interpretation of statute where agency had interpreted statute inconsistently in the past).

b. The regulations

All that being said, the relevant regulations as a whole consistently provided that any legalization applicant whose U.S.-citizen children received public cash assistance at any time on or after January 1, 1982 *might* be excludable from the legalization program as a public charge or likely to become a public charge, but that a determination of excludability had to be based on all of the alien's circumstances. The determination depended on such factors as whether the aid to the child was the alien's family's *sole* means of support and the length of time the alien's family had received assistance. *See* 8 C.F.R. § 245a.2(k)(4); Pl. Exs. 9, 18, 25 (identified *supra* at 11-12, 13, 15-16). If the assistance to the citizen child was entirely attributable to the alien parent, the alien could be excluded as likely to become a public charge. In such cases, the regulations provided for, *see* 8 C.F.R. § 245a.2(k)(2), and INS officials administering the legalization program encouraged, the liberal grant of waivers.

According to the plaintiffs, the "public charge" regulations *require* an applicant to demonstrate both a history of employment in the United States evidencing self-support

and that none of *his or her family members* have received public cash assistance. We disagree. The "proof of financial responsibility" regulation provides that

> [a]n applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

8 C.F.R. § 245a.2(d)(4). "Public cash assistance" is defined as assistance "received by the alien or his or her family members." 8 C.F.R. § 245a.1(i). Read in isolation, this "proof of financial responsibility" may be interpreted as disqualifying any alien whose child has received welfare benefits.

Read in conjunction with the "Special Rule" regulation, however, the "public charge" regulations are not written in absolute terms; they do not *require* an applicant to demonstrate that his or her citizen children have never received public cash assistance. The "Special Rule" regulation, 8 C.F.R. § 245a.2(k)(4), is an explanation of factors, including the continuity of the alien's employment history and the length of time the alien has received public cash assistance, which were to be taken into account in determining whether an alien could be admitted despite the initial determination under 8 C.F.R. § 245a.2(d)(4) that the alien was inadmissible on the public charge ground. Thus, even before the November 1987 modifications of the public charge regulations, aliens with welfare dependent children did not *automatically* fall outside the Special Rule, the regulation implementing which stated only that "[p]ast acceptance of public cash assistance within a history of consistent employment" would be a factor in

the analysis of INS, as would the duration of such assistance. 52 Fed. Reg. 16212 (May 1, 1987) (earlier version of 8 C.F.R. § 245a.2(k)(4)). While this regulation is poorly drafted, nowhere does it suggest that the receipt of public cash assistance, by the applicant himself, much less his immediate family, constituted a *per se* bar to an applicant's qualifying for amnesty under the Special Rule.

It is not surprising, then, that INS is on record as having said "the statute is clear regarding this subject and applicants *may* in fact be ineligible for legalization *if [public cash assistance] was received by their U.S. citizen child.*" 52 Fed. Reg. 16207 (May 1, 1987). Although this formulation could have been clearer, and was indeed later clarified, we read it as implying that public cash assistance received in a formal sense by the child but used by the parent to support himself could be germane on the question of whether the applicant "evidenc[es] self-support without receipt of public cash assistance." This formulation comports with pre-IRCA applications of the "public charge" ground of exclusion. *See Matter of Perez,* 15 I.& N. Dec. 136, 137 (B.I.A. 1974) ("the fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge").

There is no doubt that INS had the discretion to include aid received *indirectly by the applicant* through family members, such as AFDC funds, in the mix of factors and circumstances bearing upon an applicant's likelihood of becoming a public charge. First, when Congress enacted the public charge basis of exclusion into law, it declared:

> Since the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law, but rather to establish the specific qualification that the determination of whether an alien falls into that category rests within the discretion of the consular officers or the Commissioner [of Immigration].

S. Rep. No. 1515, 81st Cong., 2d Sess. 349 (1950) (quoted in *Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (B.I.A. 1974)). Thus, Congress has consistently recognized that bright-line, absolute rules are inappropriate in public charge determinations. Second, illegal aliens are ineligible for AFDC, SSI or New York State Home Relief benefits. *See* 42 U.S.C. §§ 602(a)(33) and 1382c(a)(1)(B); N.Y. Soc. Serv. Law § 131-k; 45 C.F.R. § 233.50. Thus, illegal aliens generally receive public cash assistance only through their U.S. citizen children, unless they are receiving benefits fraudulently.

Indeed, the very purpose of the AFDC program is to encourage the care of indigent dependent children in their own homes or in the homes of relatives by enabling states "to furnish financial assistance . . . and other services . . . to needy dependent children *and the parents or relatives with whom they are living*." 42 U.S.C. § 601 (emphasis added). It was therefore entirely proper for INS to examine an alien's dependent family unit as a whole, rather than merely the alien's financial circumstances in a vacuum, and take into account those circumstances where an applicant was indirectly receiving welfare support through his or her children, in making the determination of whether or not the applicant was likely to become a public charge.

We find that the central INS documents in this lawsuit, the memoranda dated September 23 and November 23, 1987 and April 21, 1988 issued by Associate Commissioner Richard E. Norton, Pl. Exs. 9, 14 & 25 (see *supra* at 11-12, 12 & 15-16), clarified the role in the public charge analysis played by AFDC benefits to U.S. citizen children, but did not change the basic and fundamental procedural rights conferred upon IRCA applicants by the regulations and the statute that authorized the promulgation of those regulations. Even if one is to read the April 21, 1988 memo-

randum as announcing a more liberal and accommodating policy of the INS on the AFDC issue, we note that two weeks remained before the expiration of the filing deadline for those in the plaintiff class to take advantage of whatever expansive reading one wishes to give to the final statement of Commissioner Norton on the subject.

By no later than November 17, 1987, the INS had broadly communicated to the alien population at large that the statute and the regulations authorized a legalization applicant three separate opportunities to address a "public charge" ground of exclusion: a formal determination of whether a likelihood of becoming a public charge existed; application of the "Special Rule" to determine, notwithstanding an applicant's apparent excludability, whether the alien had demonstrated a history of self-support through employment; and the granting of waivers in suitable cases even though a public charge exclusion was warranted.

Accordingly, INS's regulatory framework, which defined "public cash assistance" as encompassing aid received by amnesty applicants either directly or indirectly through their family members, was a permissible exercise of the authority vested in the Attorney General and the INS by the controlling legislation. INS's consideration of citizen children's AFDC assistance in connection with an alien's IRCA application did not violate IRCA.[8] Thus,

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[8] The fact that the Service amended its public charge regulations after the close of the filing period is of no import. In connection with the implementation of the second phase of the amnesty program, the adjustment of status from temporary to permanent resident, the definition of "public cash assistance" was modified to delete the phrase "or his or her immediate family." 54 Fed. Reg. 29442, 29443, 29448 (codified at 8 C.F.R. § 245a.1(i) (1990)). Similarly, the Special Rule regulation was amended to delete the phrases "and his or her family" from its first sentence and "and maintain his or her family"

we find that INS's public charge regulations were not arbitrary or capricious, and should be given proper legislative effect. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987); *Chevron*, 467 U.S. at 843-44. We further find as a matter of fact and law that they are not inconsistent with or violative of IRCA nor facially unconstitutional.[9]

2. Has the INS disseminated misinformation concerning its public charge regulations, in violation of IRCA and the Due Process clause of the Constitution?

Having determined that INS's public charge regulations and policies were in all respects lawful, we turn to the issue of whether they were properly disseminated. Plaintiffs contend that confusion surrounding the "public charge" standard in the last few months of the program reflects

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from its third sentence. 54 Fed. Reg. 29444, 29449 (1989) (codified at 8 C.F.R. § 245a.2(k)(4) (1990)). The Service explained at the time of the amendments that the modifications were done to make it clearer that the regulations were in line with its policies. 54 Fed. Reg. 29442 (1989). Moreover, because the public charge exclusion ground can be waived in the second phase of IRCA only for those individuals defined as aged, blind or disabled under the SSI program, *see* 54 Fed. Reg. 29453 (1989) (codified at 8 C.F.R. § 245a.3(g)(3)(ii) (1990)); 42 U.S.C. § 1382c(a)(1), the INS obviously thought it appropriate to eliminate any consideration of family members' aid at that second, and different, stage of legalization.

[9] Plaintiffs contend that the distinction between childless aliens who earned just enough to support themselves and alien parents who earned just enough to support themselves but whose children were supported by public assistance violated the Equal Protection clause of the Fifth Amendment. *See* Plaintiff's Trial Memorandum of Law at 11-12. Given Congress's plenary authority over aliens and naturalization, U.S. Const. Art. I, § 8, cl. 4; *see Mathews v. Diaz*, 426 U.S. 67 (1976), plaintiffs cannot seriously dispute Congress's power to deny admission to the U.S. based on the receipt, by an alien or her child, of public cash assistance.

the Government's failure to broadly disseminate eligibility requirements to undocumented aliens, in violation of IRCA and the Due Process clause.

IRCA emphasizes the need for broad dissemination of eligibility requirements. The legislative history of the legalization program reflects Congress's awareness that undocumented aliens would have great difficulty in learning of and understanding the legalization program because of their isolation from mainstream society and their mistrust of the Government. *See* House Report at 73 ("legalization programs in other countries have usually produced a low rate of participation because of distrust of authority and *lack of understanding among the undocumented population*"). To ensure that the program would be effective, Congress *mandated* that information explaining the program's eligibility requirements be "broadly disseminated," 8 U.S.C. § 1255a(i), and contemplated an extensive education and outreach program. House Report at 73.

The Fifth Amendment of the Constitution commands the federal government: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." When a statute or rule creates a right or entitlement, that entitlement is "property" subject to the procedural protections of the Due Process clause. *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975). If due process attaches, a deprivation of property must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). " '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' " *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Determining what process is due requires consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Thus, for example, whereas recipients of welfare benefits are entitled to an evidentiary hearing before the government may terminate their benefits, *Goldberg v. Kelly,* 397 U.S. 254, 266 (1970), recipients of disability benefits, whose "need is likely to be less than that of a welfare recipient," are not entitled to pretermination hearings. *Mathews v. Eldridge*, 424 U.S. at 349.

Although most cases dealing with benefits address the question of what process is due when benefits are terminated, at least one court has determined that due process requires adequate notice of newly-created welfare benefits. In *Grueschow v. Harris,* 492 F. Supp. 419 (D. S.D.), *aff'd on other grounds,* 633 F.2d 1264 (8th Cir. 1980), the court pointed out that

> a newly-created benefit which fails to inform a large number of the potential recipients of their eligibility deprives those people of their rights to the benefits just as surely as if they had once obtained the money, only to have the state falsely claim that they were not eligible and that it must be returned.

Id. at 424. The court held that potential recipients of newly-created benefits must receive accurate, clear, and timely notice of the rules and standards for receiving such benefits. *Id.*

Relying on *Grueschow*, plaintiffs argue that they were entitled, under the Fifth Amendment, to clear, accurate and timely notice of INS's public charge regulations. *See also Perez-Funez v. District Director, INS*, 619 F. Supp. 656, 663 (C.D. Cal. 1985) (due process rights of unaccompanied minor aliens were violated where INS officials failed to advise aliens, before having them sign voluntary departure forms, of their right to a deportation hearing); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 376 (C.D. Cal 1982) (principles of due process and fundamental fairness required the INS to advise Salvadoran aliens of their right to apply for political asylum before requesting them to depart voluntarily). Furthermore, the Government may be required to make greater efforts at disseminating rules and standards when those affected by the rules are particularly inexperienced or incompetent. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983).

Relying on *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), the Government argues that plaintiffs do not have a legitimate claim of entitlement to citizenship under IRCA, and, consequently, that their legal claims are not subject to procedural due process analysis. *Olegario* involved a 1942 amendment to the Nationality Act of 1940. The amendment provided for the naturalization of non-citizens who served in the U.S. armed forces during World War II. The amendment exempted eligible persons from certain preexisting statutory naturalization requirements, provided for their overseas naturalization, and *authorized* the INS commissioner, "with the *approval* of the Attorney General", *id.* at 208, to provide application forms and to "make such rules and regulations as were necessary to implement the Act." Pursuant to that authorization, a government official was stationed in the Philippines at the

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end of the war to naturalize eligible aliens. But in response to Filipino fears that the program would cause a mass exodus of Filipino men, the naturalization official was withdrawn from the country after only two months. No INS official was in the Philippines from October 1945 to July 1946. Technically the program continued but, as a practical matter, Filipinos could no longer apply. A new official was stationed in the Philippines in August of 1946 but the entire 1940 Act expired four months later.

Because the Act did not grant eligible persons "a vested right to citizenship" but merely "liberalized the requirements and established a mechanism . . . to enable soldiers overseas to apply for naturalization," 629 F.2d at 223, the Court of Appeals held that traditional due process analysis did not apply. The court went on to analyze the claim "simply as a statutory interpretation question inquiring whether the executive's actions clearly contravened a congressional mandate." *Id.* at 224. Because the decision to provide or withdraw the naturalization official was subject to the Attorney General's approval, the Court concluded that the Government acted within its discretion in withdrawing the naturalization official from the Philippines. *Id.* at 228.[10]

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[10] In *INS v. Pangilinan*, 486 U.S. 875, 108 S. Ct. 2210 (1988), discussed *infra* at 68-72, in which the Supreme Court reviewed a Ninth Circuit decision concerning the Filipino war veterans, the Court "assum[ed] that [the veterans] can properly invoke the protections of the United States Constitution, and grant[ed] that [the veterans] are members of a special class that Congress intended to favor with statutory entitlements to naturalization." *Id.* at __, 108 S. Ct. at 2216. Nevertheless, the Court agreed with the Second Circuit's conclusion in *Olegario* that the war veterans had not been deprived of their rights under the Due Process clause of the Fifth Amendment. *Id.* at __, 108 S. Ct. at 2216-17. The Court observed that, unlike non-citizen servicemen in other parts of the world, the Filipinos had the benefit of the presence of a naturalization officer in the Philippines from August

IRCA is distinguishable from the 1940 Nationality Act because IRCA *requires* the INS to broadly disseminate eligibility standards and to grant legal status to eligible applicants. In contrast, the 1940 Act provided eligible Filipinos with, at best, an "opportunity" to become citizens, and left the decision to post a naturalization officer in the Philippines to the Government's discretion. Indeed, the Court in *Olegario* distinguished the 1940 Nationality Act from statutes that *mandate* benefits and thus create an interest protected by due process. *See, e.g., Board of Pardons v. Allen,* 482 U.S. 369, 107 S. Ct. 2415 (1987) (when parole statute mandates release, it creates a liberty interest subject to due process).

IRCA is such a statute that mandates benefits and creates an interest protected due process. IRCA provides that the INS "shall" grant legalized status to aliens who meet the eligibility criteria and "shall" broadly disseminate eligibility requirements. We conclude that Congress's use of the word "shall" in IRCA, making statutory actions mandatory, gives rise to statutory entitlements to amnesty which are subject to due process protection. *See Allen,* 482 U.S. at 376-77, 107 S. Ct. at 2419-20.

It is, however, not necessary to analyze and discuss, separately from IRCA's specific dissemination requirements, what process is due under the Fifth Amendment. The express statutory requirement in IRCA, that the INS "broadly disseminate information respecting the benefits which aliens may receive under this section and

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1945 to October of that year, and from August to December 1946. If INS was not obligated to station naturalization officials in other parts of the world at all, and nothing in the 1940 Act indicates that it was, then it was certainly not obligated to station an officer in the Philippines throughout the naturalization program. Thus, the Court rejected the argument that the withdrawal of the naturalization officer from the Philippines deprived respondents of their Due Process rights.

the requirements to obtain such benefits," 8 U.S.C. § 1255a(i), is at least as broad as, if not more stringent than, the requirements of due process. Thus, if the INS's dissemination efforts pass muster under IRCA, they meet plaintiffs' due process concerns.

We find that the substance and scope of INS's outreach, education, and public awareness efforts broadly complied with its obligation under the Act and the Constitution to inform undocumented aliens of their rights under IRCA. The INS designed and carried out a comprehensive public awareness and media campaign specifically targeted at the alien population. Gov. Exs. A-C, E, K-L, N, P-T. It routinely advised QDEs of its policies and procedures, including the availability of waivers, to make the amnesty program succeed, Gov. Exs. G-I, M at 0100, and its cooperative agreements contractually bound the QDEs to disseminate waiver information to amnesty applicants, Pl. Exs. 37 at 6, 38 at 8.

We further find that INS did not instruct those attending its training sessions that aliens with citizen children on welfare were ipso facto barred from legalization. For example, Berryman's July 1987 memorandum, Pl. Ex. 54, which was prepared before the technical amendments to the regulations made it unambiguous that separate waiver applications were not required from those who could otherwise qualify under the Special Rule, indicated that there was "no reason" why INS would not act favorably on waiver applications filed by aliens with welfare dependent citizen children. *Id.* at 5.

In essence, plaintiffs argue that confusion in the alien population as to public charge regulations demonstrates that the INS failed to disseminate its public charge regulations. Plaintiffs allege that there was a widespread belief among aliens that the INS was applying a *per se* rule, excluding all aliens whose citizen children had received

public assistance. We find that plaintiffs have failed to carry their burden of proof in this regard. Furthermore, the most persuasive evidence to rebut this allegation, that the INS was not broadly communicating its message to the alien community that welfare receipt by an alien's child was not in practical and ultimate terms a bar to legalization, is INS's de facto adjudication of actual amnesty applications. A substantial representative sample of legalization applications filed in New York State effectively demonstrates that throughout the filing period the INS approved the great majority of applications not only of aliens with citizen children receiving public cash assistance, but also of aliens who were *themselves* on welfare. Gov. Exs. EE, FF. In most cases, the aliens themselves were not even required to file separate waiver applications.

This evidence contradicts the plaintiffs' principal argument that the alien population was confused and misled by the INS regulations on public charge policy. It demonstrates that aliens in the assertedly injured class were coming forward and being approved in spite of potential "public charge" problems. Indeed, this may explain why, although we were initially advised that the plaintiff class herein numbered in the thousands, so few class witnesses were presented at trial. Word of these approvals, passing rapidly through the family and associational connections of the alien population, galvanized it to go directly to the INS for the benefit, *see* Tr. 768 (testimony of Commissioner O'Reilly, quoted *supra* at 26); Tr. 829 (testimony of Commissioner Slattery, quoted *supra* at 31), debates on regulation nuances among the lawyers, advocates, and government bureaucrats notwithstanding.

We are further persuaded, upon careful consideration of the testimony of INS officials Byrnes, O'Malley, Berryman and O'Reilly, that there never was any *per se* rule with respect to receipt of public assistance by an applicant's

children to the effect that it would automatically disqualify on public charge grounds an applicant without regard to the Special Rule or waiver; that INS instruction and training of its own personnel and QDE personnel was consistent with that policy; and that the public position of INS personnel on the public charge question did not misrepresent that policy.

The testimony to the contrary by alien witnesses was generalized, amorphous, and remarkably redundant on the crucial point, with little reference to or memory of context in which the alleged misleading radio and television statements were made. There was, we are sad to observe, something of a drill in their cadenced invocation of the decisive words.

We decline to give any significant weight to the testimony of Irene Leacock, who asserted that, in a legalization conference conducted by her organization, the Nicaraguan Committee, in the spring of 1988, Mr. O'Malley or his colleague stated categorically that legalization could not be obtained by parents whose children had or were receiving public assistance. We further find that any confusion that may have attended Mr. Berryman's expressions on the matter were de minimis, and in any case ceased when the Special Rule regulation was amended.

In sum, we find that the administration and implementation by the INS of the amnesty program, as it related to the public charge ground of exclusion, complied in all respects with the requirements of the Act and did not contravene the Due Process requirements of the Constitution.

3. Does the Court have the power to grant the relief sought?

Even if the plaintiffs had prevailed on the merits, we do not believe, based upon this record, that the Court has the authority to compel INS to accept applications after the

May 4, 1988 expiration of the amnesty period. The appropriate starting point in addressing this issue is *INS v. Pangilinan*, 486 U.S. 875, 108 S. Ct. 2210 (1988).

Pangilinan is in all likelihood the last chapter in the Filipino war veteran cases. The respondents were sixteen Filipino nationals who served with the U.S. armed forces during World War II. Fourteen of the respondents were in the Philippines before the 1946 cutoff date but took no action toward being naturalized. One of the respondents made inquiries at the American embassy in July 1946 but was told that there was no one there who could assist him. Decades later each of the respondents filed petitions for naturalization in federal court in California based on the 1940 Act, which had expired in 1946. The district court denied the petitions but the Ninth Circuit reversed, holding that the withdrawal of the naturalization officer from the Philippines violated what it called the mandatory language of the 1940 Act and that naturalization of the respondents was an appropriate equitable remedy. *Pangilinan v. INS*, 796 F.2d 1091 (9th Cir. 1986).[11]

In reversing the Ninth Circuit, the Supreme Court first observed that the Constitution grants Congress the express authority to establish rules of naturalization. *Pangilinan*, 108 S. Ct. at 2215. The legislation at issue in *Pangilinan* established a *fixed, immutable* cutoff date of December 31, 1946 for the filing of naturalization petitions. Furthermore, Congress adopted a new citizenship program in 1948 which excluded Filipino servicemen and specifically provided that *timely* applications under the 1940 Act which were still pending would be reviewed under the 1948 provisions. Finally, in 1961, Congress amended the 1952 Nationality Act, specifying that any petition thereafter

[11] The Court ordered that respondents be naturalized, not simply that they be given an opportunity to petition for naturalization.

filed would be reviewed under the 1952 Act. *Id.* Thus, the respondents were confronted with an expired deadline in the Act under which they sought benefits, as well as the mandate of two subsequent pieces of legislation. Accordingly, the Court concluded that "respondents have no statutory right to citizenship." *Id.*

Pangilinan was the third Ninth Circuit decision on the Filipino war veteran program that came before the Court. The Court noted that in the first such case, *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam), it concluded that the challenged actions of INS did not give rise to an estoppel against the government because INS " 'in enforcing the cutoff date established by Congress . . . [was] enforcing the public policy established by Congress.' " *Pangilinan*, 108 S. Ct. at 2215 (quoting *Hibi*, 415 U.S. at 8).[12] Although the Ninth Circuit recast its theory in *Pangilinan*, "not that estoppel eliminates the effectiveness of the December 31, 1946, cutoff, but that equitable authority to craft a remedy enables the conferral of citizenship despite the cutoff", 108 S. Ct. at 2215, the Supreme Court's conclusion was the same: such theories cannot override a public policy established by Congress. *Id.*

The Court emphasized that district courts do not have equitable power to confer citizenship. " 'An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress.' " *Pangilinan*, 108 S. Ct. at 2216 (quoting *United States v. Ginsberg*, 243 U.S. 472, 474

[12] Though not mentioned in *Pangilinan*, the Court in *Hibi* also concluded that INS's failure to fully publicize the rights accorded under the 1940 Act or its failure to station a naturalization officer in the Philippines during the full period those rights were available did not amount to the kind of "affirmative misconduct" necessary to invoke estoppel against the government. *Hibi*, 415 U.S. at 8-9.

(1917)). " 'Once it has been determined that a person does not qualify for citizenship . . . the district court has no discretion to ignore the defect and grant citizenship.' " *Id.* (quoting *Fedorenko v. United States,* 449 U.S. 490, 517 (1981)). Thus, "[n]either by application of the doctrine of estoppel, nor by equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations." *Id.*

Relying in part on *League of United Latin American Citizens v. INS,* No. 87-4757-WDK (C.D. Cal. August 12, 1988) (*LULAC*), in which the court ordered the INS to receive amnesty applications for an additional six-month period,[13] plaintiffs argue that *Pangilinan* is distinguishable from this action because (1) INS was violating, rather than enforcing, the public policy established by Congress, (2) IRCA merely creates a twelve-month period of amnesty, rather than an immutable cut-off date, and (3) plaintiffs here seek merely to file applications, rather than be granted citizenship. *See LULAC,* slip op. at 7-8. Plaintiffs therefore assert that the Court is not precluded by *Pangilinan* from compelling the INS to accept IRCA applications after the May 4, 1988 deadline.

We disagree. The Congress, as we have noted, explicitly established May 8, 1988 as the cut-off date for filing applications for amnesty, and reaffirmed that determination in April 1988, by refusing to extend the deadline. 134 Cong. Rec. S5041-43 (daily ed. April 28, 1988). In refusing to accept applications beyond that deadline, INS is enforcing

[13] The court found that the INS, in dissuading the plaintiffs from applying for amnesty during at least part of the twelve-month period, in effect deprived the plaintiffs of the full twelve-month statutorily mandated application period. Slip op. at 6. Accordingly, the *LULAC* court determined that it had the power to order INS to accept applications for an additional six-month period, to compensate the plaintiffs for the application time they lost because of INS's actions. *Id.* at 9.

the public policy established by Congress. Because no application filed after the May 8, 1988 deadline is "timely filed", an essential qualification for amnesty under IRCA, aliens who did not file applications before May 8, 1988 are statutorily ineligible for amnesty. Under the analysis of *Pangilinan,* we may not compel INS to accept applications for amnesty after May 8, 1988.

Even if *Pangilinan* were not controlling, we do not believe that we could or would exercise our equitable powers in favor of the plaintiffs because there has been no showing of affirmative misconduct by the Government in its administration of the legalization program under IRCA.

In determining whether or not equitable tolling[14] of the filing deadline is appropriate, we must consider whether equitable tolling is consistent with congressional intent and called for by the facts of the case. *Bowen v. City of New York,* 476 U.S. 467, 479-80 (1986). In *City of New York,* the Court noted that the statute in question, involving disability benefits, was designed to be unusually protective of claimants rights and also permitted the agency to toll the 60 day statutory period for appeal in individual cases for a variety of equitable reasons. The Court also observed that plaintiffs only discovered the full extent of the agency's wrongful conduct after expiration of the 60 day appeal period. *Id.* at 480. In addition, although the Court did not expressly mention "affirmative misconduct" as a prerequisite to equitable tolling, the conduct at issue was so characterized. The Court quoted with approval the circuit court's description of the government's conduct as secretive, and the Court implied that the agency was not faithfully executing its duties. *Id.* at 480-81.

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[14] Although the twelve-month filing period does not establish a statute of limitations within which to bring a court action, we analogize equitable tolling of a statute to equitable extension of the filing deadline.

Moreover, the Court was applying "traditional equitable tolling principles," *id.* at 479 (citing *Honda v. Clark*, 386 U.S. 484, 501 (1986)), under which affirmative misconduct is required. *See LULAC*, slip op. at 4-5. Thus, equitable tolling in cases involving the exercise of administrative power has largely been limited by the Supreme Court to those situations where the record shows that the Government engaged in clandestine or otherwise misleading conduct that deprives a claimant of the opportunity to exercise his or her rights. *Bowen v. City of New York*, 476 U.S. at 480-81 (1986); *see also New York v. Sullivan*, 906 F.2d 911, 917 (2d Cir. 1990) (tolling appropriate where "government misconduct" kept plaintiffs from appreciating scope of rights); *Wong v. Bowen*, 854 F.2d 630, 631 (2d Cir. 1988) (equitable tolling appropriate only where government has hindered claimant's attempts to exercise her rights by acting in a misleading or clandestine way).

Here, equitable tolling is not consistent with congressional intent nor called for by the facts of the case. As we have noted, Congress has strongly opposed extension of the deadline. In addition, the record demonstrates not a hidden and narrowing definition and application of criteria, but a public and liberalizing clarification of the relevant criteria. The regulations could undoubtedly have been more clearly drafted and more broadly disseminated, but the Government's shortcomings as evidenced by this record do not rise to the level of affirmative misconduct required to equitably toll the limitations period.

Nor should the INS be equitably estopped from refusing to accept applications past the deadline. Again, even assuming that the clarifying memoranda could and should have been more broadly disseminated, a claim certainly not established by plaintiffs, an agency's failure to fully publicize rights created by Congress cannot give rise to

an estoppel against the government. *Lyng v. Payne*, 476 U.S. 926, 935-36 (1986); *INS v. Hibi*, 414 U.S. 5, 8-9 (1973).

With respect to the QDEs, we conclude that any irregularities involving them established in the record are not attributable to the Government because they were not caused, condoned, or approved by the INS. First, we find that the plaintiffs have not carried their burden of showing that the QDEs were agents of the INS and not mere independent contractors. Accordingly, we expressly decline to adhere to our previous, uninformed characterization of the QDEs as "quasi-governmental agencies under IRCA," Order dated April 26, 1988, and now find that the QDEs were not in fact agents of the INS. Even if the QDEs were agents of the INS, the Government cannot be bound by QDEs' actions that were outside the scope of their authority. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Doe v. Civiletti*, 635 F.2d 88, 96 (2d Cir. 1980). In violation of both Section 245a(c)(3) of IRCA and the Agreements they entered into with INS, QDEs admittedly failed to inform applicants of the availability of waivers, pre-adjudicated applications for amnesty, and withheld them from the INS.

The only question remaining, then, is whether any of the alien plaintiffs have established that they constructively filed applications for amnesty *prior* to the expiration of the amnesty period on May 4, 1988. In spite of our repeated emphasis upon this theory of relief, both in previous proceedings and during the trial, *see* Order dated April 26, 1988 at 3; Tr. 622, 624, plaintiffs have not attempted seriously and energetically to establish that any individual members of the class took steps in pursuing amnesty prior to the deadline that would be sufficient to constitute a constructive filing.

To establish a constructive filing, the plaintiffs must demonstrate that class members took some affirmative steps to attempt to file properly a timely legalization application. *See, e.g., In re Thornburgh,* 869 F.2d 1503, 1516 (D.C. Cir. 1989) ("The constructive filing argument . . . entails a showing that the aliens in question complied with the statute by attempting to file [legalization] applications in a proper and timely fashion"); *In re Naturalization of 68 Filipino War Veterans,* 406 F. Supp. 931, 940 (N.D. Cal. 1975) (naturalization petitioner who had timely filed appropriate form commencing naturalization proceedings took the only affirmative step a prospective petitioner could take under the INS's regulations and had, therefore, constructively filed such petition).

Here the testimony of all but one of the alien witnesses established that, having received erroneous information regarding their eligibility, they made no effort to substantiate that information with either the INS or a QDE, let alone file a timely application. Additionally, the one witness who did have contact with a QDE did not personally discuss her eligibility with anyone from that organization.

For example, Maria P. testified that she consulted Julio Hernandez after she had heard that a child's receipt of public assistance would disqualify a parent from legalization eligibility. Tr. 407, 411. Mr. Hernandez, however, was neither a Government official nor an employee of a QDE. Tr. 416. Similarly, Miriam B. testified that she consulted with a private attorney and two unidentified Catholic immigrants' rights organizations concerning her legalization eligibility. Tr. 479-83. There was no evidence offered to establish that either organization was a QDE. Tr. 490. Additionally, even though Ms. B. was informed that the public charge ground could be waived, Tr. 483, she did not apply for amnesty because she was told by the

immigrants' rights representative that her chances of being approved were "next to nothing." Tr. 483.

Moreover, three of the class members, Jenny C., Sonia R. and Rosa C., made absolutely no effort to inquire as to their legalization eligibility after they heard that receipt of public assistance by themselves or by their children disqualified them from the program. Jenny C. claimed that she met a friend in May 1987 who told her that she was ineligible and showed her a document, relating to a different phase of the program, which stated that receipt of "certain kinds of public assistance" disqualified *temporary* resident aliens from adjusting their status to that of a *permanent* resident. Tr. 426-28; Pl. Ex. 30. Ms. C., who still had approximately one full year to clarify her legalization eligibility status, made no further inquiries. Tr. 435.

Similarly, Sonia R. admitted that her children did not even begin to receive public assistance until July or August 1987, *after* she had heard that receipt of such benefits would make her ineligible for legalization. Tr. 447-49; 451-52. Yet, she also made no further effort to clarify her amnesty prospects. Although she indisputably had about a three-month window of opportunity within which to file, she did not do so at the behest of her father-in-law and because she wanted "to wait a while" after her recent marriage. Tr. 451-55.

Rosa C., who claimed that she first believed herself to be ineligible for legalization "some months" after the start of the program, Tr. 460-61; 462-63, also failed to confirm that information with either a QDE or the INS. Finally, while plaintiff-intervenor Linda Loe testified that her mother attempted to clarify Ms. Loe's eligibility with a QDE, Concerned Citizens, Ms. Loe did not personally discuss her prospects with anyone at that organization. Tr. 395.

In similar cases, courts have found a constructive filing only if the applicant has taken all affirmative steps to comply with the relevant statute before the expiration of the statutory period. For example, in *In re Petition of Vacontios*, 155 F. Supp. 427 (S.D.N.Y. 1957), this Court, deeming a naturalization petition timely filed even though it had been submitted beyond the statutory one-year deadline, explained:

> When one takes *all necessary affirmative steps* to comply with the literal requirements of a statute and is prevented from complying fully by the failure of an administrative agency to take the steps necessary to permit his compliance he will not be barred from asserting his rights under the statute.

Id. at 422 (emphasis added) (citations omitted). Relying on *Vacontios*, the Northern District of California in *68 Filipino War Veterans* held that naturalization petitioners who had taken the " 'only affirmative step a prospective petitioner could take under the Service regulations,' " had constructively filed their naturalization petitions. 406 F. Supp. at 940 (citations omitted).

More recently, the District of Columbia Circuit rejected the Government's argument that prospective IRCA applicants were foreclosed from establishing that they had constructively filed their applications. The court explained, however, that this was because:

> it is entirely possible that some members of the class in this case could show that they took affirmative steps to file before May 4, 1988, thus, warranting a finding of constructive filing. If, for example, a[n] . . . alien went to an INS office and was turned away on the basis of 8 C.F.R. § 245a.1(d), the alien's action might have been "the only affirmative step a prospective petitioner could take". . . . Consequently, that

> action might be considered "the constructive equivalent of filing a petition" for amnesty.

In re Thornburgh, 869 F.2d at 1516 (citations omitted).

In sharp contrast to the foregoing, the effort expended by these witnesses during the filing period simply does not rise to a level sufficient to find that they had constructively filed their applications. At most, some of the witnesses claimed that they took some steps to inquire about their eligibility from non-governmental sources. None of these witnesses, however, took any affirmative, conscientious step to actually file an application. Indeed, *none* of these witnesses contacted the INS to inquire about filing during the amnesty period. Nor has *any* person come forth during this entire case and alleged that he or she was turned away at an INS legalization office because he or she had a welfare-dependent child. In short, the alien witnesses in this case have utterly failed to establish that they took "all necessary affirmative steps" to perfect their claims. We therefore find that the plaintiffs and class members did not constructively file timely amnesty claims.

Accordingly, the Clerk of the Court is directed to enter judgment in favor of the Government, and the complaint is dismissed.

SO ORDERED.

/s/ Kenneth Conboy

KENNETH CONBOY, U.S.D.J.

Dated: New York, New York
April 18, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 2265

CESAR PERALES, ET AL., PLAINTIFFS

against

EDWIN MEESE, III, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

KENNETH CONBOY, District Judge:

The Government has taken steps to meet plaintiffs' principal complaint: a lack of clearly disseminated standards governing the "public charge" regulations of the Immigration and Naturalization Service, with particular reference to the narrow circumstances in which receipt of AFDC benefits by members of a family unit are relevant to eligibility of an applicant for legalization under the Immigration Reform and Control Act of 1986 ("IRCA").

Specifically, the Service has today promulgated to all regional and district legalization offices, and all Qualified Designated Entities approved to accept legalization applications throughout the nation, definitive instructions and criteria that are not inconsistent with the advice of INS Counsel, its Assistant Commissioner, William S. Slattery, and its Associate Commissioner, Richard E. Norton, set forth and referred to at various points throughout plaintiffs' papers and exhibits.

For the present, the Court finds it unnecessary to grant the relief sought in the application for the Temporary Restraining Order. The hearing on the preliminary injunction sought in this action is scheduled for April 25, 1988, eight days prior to the statutory expiration of the application period for legalization under IRCA. If the plaintiffs prevail at any subsequent stage of this litigation, the Court possesses equitable power to toll the expiration of the statutory time limit to preserve any rights of plaintiffs frustrated by ambiguous procedures. Furthermore, Congress is, according to both parties, considering an extension of the May 4 deadline, which might obviate the need for the preliminary relief sought by plaintiffs. Additionally, the Government has not yet had the opportunity to respond to the voluminous papers of the plaintiffs under the briefing and submission schedule agreed to by all the parties. Finally, the plaintiffs' own proof indicates some doubt as to the effectiveness of a media campaign designed to communicate prior to May 4, 1988 to the immigrant population at large the substance of today's INS advice to its agents and QDEs. It is, therefore, apparent that plaintiffs do not now face irreparable harm, and accordingly, the relief sought in the application for a Temporary Restraining Order is denied.

SO ORDERED.

/s/ Kenneth Conboy
U.S.D.J.

Dated: New York, New York
April 19, 1988

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 2265

CESAR PERALES, ET AL., PLAINTIFFS

against

EDWIN MEESE, III, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

KENNETH CONBOY, District Judge:

Plaintiffs' motion for a preliminary injunction is in all respects denied. No showing has been made that plaintiffs will be irreparably injured if the relief sought is not granted at this stage of the litigation.

The core of this dispute involves the effect of receipt of public assistance to families with dependent children (AFDC) upon the determination by the Immigration and Naturalization Service (INS) that an applicant is or is not likely to become a public charge, a crucial disqualification factor under the law. The regulations in question have been on the books since May 1, 1987, and the INS has taken steps to substantially clarify their "public charge" meaning in three phases: the November 23, 1987 memorandum of Commissioner Richard E. Norton[1], the Febru-

[1] The Norton memorandum clarified INS' position only with respect to the receipt of Supplemental Security Income by an applicant's immediate family members.

ary 10, 1988 letter of Assistant Commissioner William S. Slattery, and the April 21, 1988 memorandum of Commissioner Norton. The INS is also attempting to locate applicants who were erroneously excluded under the more restrictive "public charge" standard.[2]

It is now clear that persons who may have been disqualified after having applied, or were discouraged from applying by qualified designated entities (QDEs)—which function as quasi-governmental agencies under IRCA—may now have a wholly new basis to apply based on these clarifications. Because the government concedes that the Commissioner has authority, under conventional administrative powers, to find that constructive filing has occurred with respect to such applicants after the expiration of the amnesty period on May 4, 1988 (see minutes of Hearing, April 25, 1988), intervention at this time is not necessary.[3] In other words, any harm that might accrue toward plaintiffs is not irreparable.

Nor is there a need for immediate relief with respect to a third category of possible plaintiffs who may not have had any direct contact with the INS or with a QDE, but who could, after expiration of the amnesty period, demonstrate that their dependent American national children received AFDC, and that they decided not to apply on the basis of reading or being apprised of the controlling regulations, which ambiguity is conceded by the Commissioner requiring promulgation of the clarification with only weeks left in the program. Plaintiffs in this category, upon an ade-

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[2] These steps, taken voluntarily by the INS, conform substantially to the preliminary relief imposed by the court in *Ayuda v. Meese*, slip op., No. 88-0625 (D.D.C. March 30, 1988).

[3] The Commissioner has already effectively extended the May 4, 1988 deadline for applicants who file skeletal applications before May 4, and for applicants who give approval to QDEs to forward their application to the INS.

quate showing of injury, may be the subject of subsequent remedial relief under the doctrine of equitable tolling. *E.g., Bowen v. City of New York*, 476 U.S. 467 (1986); *In the Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). Accordingly, no irreparable harm has been demonstrated with respect to any prospective member of the class that would justify entry of injunctive relief, especially in light of the fact that Congress has under active consideration extension of the amnesty period beyond May 4, 1988. Indeed, the Court notes that the House of Representatives has voted to approve legislation extending the filing deadline, and this bill is presently receiving active consideration in the United States Senate.

The Court further notes that although it has had this matter under consideration for 25 days and has conducted three hearings, no witnesses have been called to support the plaintiffs' case. Furthermore, the Court observes that the three anonymous individual plaintiffs whose affidavits have been submitted have adequate time to submit applications prior to May 4, and have been adequately apprised of their rights (see the Court's order dated April 19, 1988). Finally, it should be emphasized that evidence, by affidavit, of the dimension and character of the class sought to be certified is largely speculative and generalized.

The Court concludes that the rights of all parties can be adequately protected through a systematic and fact oriented trial on the merits, followed by the exercise of the administrative authority of the Commissioner and the equitable power of the Court if the record justifies it.

SO ORDERED.

/s/ Kenneth Conboy
U.S.D.J.

Dated: New York, New York
April 26, 1988

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

88-8035

CESAR PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL., PLAINTIFFS-APPELLANTS

v.

EDWIN MEESE, III, AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS-APPELLEES

ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of May, one thousand nine hundred and eighty-eight.

Upon consideration of plaintiffs-appellants' ("plaintiffs") application for an injunction pending the appeal of an April 26, 1988 order of the United States District Court for the Southern District of New York, Kenneth Conboy, *Judge,* denying plaintiffs' motion for a preliminary injunction, it is hereby

ORDERED, that pending the argument of this appeal defendants-appellees ("defendants") shall continue to permit the filing by members of the proposed plaintiff class of applications for temporary resident status pursuant to 8 U.S.C. § 1255a, on the same basis as has been in effect

during the May 5, 1987 through May 4, 1988 application period. Plaintiff class members who file applications otherwise in conformity with the applicable procedures with the Immigration and Naturalization Service ("INS") pursuant to the terms of this order shall be granted provisional work authorization which will be valid only for so long as this Order remains in effect, and shall be protected from any deportation proceedings to the extent set forth in 8 U.S.C. § 1255a(e)(2) only during the period while this order is effective. Solely for purposes of this Order, the proposed plaintiff class is defined as "all undocumented aliens residing in New York State on or before May 4, 1988 who assert that he or she believed that the receipt of AFDC or Home Relief by his or her United States citizen or permanent resident dependents would affect his or her eligibility for legalization." Defendants shall forthwith provide copies of this Order to: (1) all INS personnel involved in accepting legalization applications in New York State; (2) all qualified designated entities in New York State; (3) all INS personnel involved in any aspect of deportation proceedings in New York State; (4) all immigration judges who preside over deportation proceedings in New York State; (5) all plaintiff class members who, during the effective period of this Order: (a) are issued an order to show cause for deportation; (b) are offered, or request, a "waiver of deportation and consent to voluntary departure"; (c) come before an immigration judge within the context of a deportation proceeding; or (d) are about to be deported. Defendants agree to stay the deportation of any alien for the pendency of this Order whose United States citizen or legal permanent resident dependents receive or have received AFDC or Home Relief and who can otherwise demonstrate prima facie eligibility for temporary resident status under 8 U.S.C. § 1255a.

ORDERED, that no person shall acquire any rights by virtue of this Order or any action taken pursuant hereto beyond the date of argument of this appeal.

/s/ James L. Oakes
JAMES L. OAKES,

/s/ Lawrence W. Pierce
LAWRENCE W. PIERCE, Circuit Judges

APPENDIX F

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1307, Docket 88-6115

CESAR A. PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ROBERT ABRAMS, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK, THE STATE OF NEW YORK, AND THE CITY OF NEW YORK, AND SARA DOE, JANE ROE, AND ANNE COE, INDIVIDUALLY, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-APPELLANTS

v.

EDWIN MEESE, III, AS ATTORNEY GENERAL OF THE UNITED STATES, WILLIAM S. SLATTERY, AS ASSISTANT COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, EDWARD WILDBLOOD, AS LEGALIZATION DIRECTOR OF THE INS EASTERN REGIONAL OFFICE, GILBERT TABOR, AS INS EASTERN REGIONAL PROCESSING FACILITY DIRECTOR, CHARLES SAVA, AS INS DISTRICT DIRECTOR OF THE NEW YORK DISTRICT, AND OTIS R. BOWEN, AS SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES

Appeal from an order entered in the United States District Court for the Southern District of New York, Conboy, J.

Before LUMBARD, MESKILL and WINTER, Circuit Judges.

PER CURIAM:

This is an appeal from an order entered in the United States District Court for the Southern District of New York, Conboy, J., denying plaintiffs-appellants' motion for a preliminary injunction. The plaintiffs-appellants are the State of New York, the City of New York, the Commissioner of the New York State Department of Social Services, the Attorney General of the State of New York, and three anonymous undocumented aliens who are seeking to apply for the status of lawful residents under the terms of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-608 100 Stat. 3359 (1986). IRCA established a program under which undocumented aliens who had resided in this country for a requisite time period, and who were otherwise qualified for admission as immigrants could seek lawful resident status. *See* 8 U.S.C. § 1255a (Supp. IV 1986). Applicants seeking the benefit of that so-called amnesty or "legalization" program were required to do so no later than May 4, 1988. *See* 8 U.S.C. § 1255a(a)(1)(A); 8 C.F.R. § 245a.2(a)(1) (1988). Congress recently considered extending the May 4 deadline but failed to do so. *See* 134 Cong. Rec. S 5041-43 (daily ed. Apr. 28, 1988).

The appellants in this case argue that the deadline should now be extended for a class of undocumented aliens who were unfairly affected by certain regulations promulgated by the Immigration and Naturalization Service (INS) pursuant to IRCA. In sum, appellants argue that INS regulations precluded undocumented aliens with citizen children who receive public assistance from seeking legalization under the statute, *see* 8 C.F.R. §§ 245a.2(d)(4), 245a.1(i), *see also* 52 Fed. Reg. 16,207 (May 1, 1987), when Congress intended that eligibility

under the statute should hinge solely on an individual applicant's ability to be *self*-supporting, *see* 8 U.S.C. § 1255a(d)(2)(B)(iii). They argue that the effect of the regulations, and the INS' allegedly inconsistent policies, was to deter qualified applicants from seeking the benefits of the program until it was too late to take advantage of them. The individual plaintiffs seek to represent a class of all similarly situated potential applicants in New York State. The state and municipal plaintiffs challenge the regulations in their own capacity and seek to represent the class of potential applicants in a *parens patriae* capacity.

After bringing this action in the district court, but before obtaining certification of a class, appellants sought a preliminary injunction imposing, *inter alia*, a renewable sixty-day extension of the May 4 deadline while the INS and the United States Attorney General promulgated and publicized new regulations and policies more consistent with the terms and intent of IRCA. The district court denied the motion. The denial is hereby affirmed, substantially for the reasons stated in Judge Conboy's Memorandum Opinion and Order dated April 19, 1988, 685 F.Supp. 52 (S.D.N.Y.1988).

APPENDIX G

8 U.S.C.:

§ 1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence

(a) Temporary resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(1) Timely application

(A) During application period

Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General.

(B) Application within 30 days of show-cause order

An alien who, at any time during the first 11 months of the 12-month period described in subparagraph (A), is the subject of an order to show cause issued under section 1252 of this title, must make application under this section not later than the end of the 30-day period beginning either on the first day of such 12-month period or the date of the issuance of such order, whichever day is later.

(C) Information included in application

Each application under this subsection shall contain such information as the Attorney General may require, including information on living relatives of the applicant with respect to whom a petition for

preference or other status may be filed by the applicant at any later date under section 1154(a) of this title.

(2) Continuous unlawful residence since 1982

(A) In general

The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

(C) Exchange visitors

If the alien was at any time a nonimmigrant exchange alien (as defined in section 1101(a)(15)(J) of this title), the alien must establish that the alien was not subject to the two-year foreign residence requirement of section 1182(e) of this title or has fulfilled that requirement or received a waiver thereof.

(3) Continuous physical presence since November 6, 1986

(A) In general

The alien must establish that the alien has been continuously physically present in the United States since November 6, 1986.

(B) Treatment of brief, casual, and innocent absences

An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

(C) Admissions

Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

(4) Admissible as immigrant

The alien must establish that he—

(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section,

(B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,

(C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particuler social group, or political opinion, and

(D) is registered or registering under the Military Selective Service Act [50 App. U.S.C. 451 et seq.], if the alien is required to be so registered under that Act.

For purposes of this subsection, an alien in the status of a Cuban and Haitian entrant described in paragraph (1) or (2)(A) of section 501(e) of Public Law 96-422 [8 U.S.C. 1522 note] shall be considered to have entered the United States and to be in an unlawful status in the United States.

* * * * *

(d) Waiver of numerical limitations and certain grounds for exclusion

(1) Numerical limitations do not apply

The numerical limitations of sections 1151 and 1152 of this title shall not apply to the adjustment of aliens to lawful permanent resident status under this section.

(2) Waiver of grounds for exclusion

In the determination of an alien's admissibility under subsections (a)(4)(A), (b)(1)(C)(i), and (b)(2)(B) of this section—

(A) Grounds of exclusion not applicable

The provisions of paragraphs (14), (20), (21), (25), and (32) of section 1182(a) of this title shall not apply.

(B) Waiver of other grounds

(i) In general

Except as provided in clause (ii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

(ii) Grounds that may not be waived

The following provisions of section 1182(a) of this title may not be waived by the Attorney General under clause (i):

(I) Paragraphs (9) and (10) (relating to criminals).

(II) Paragraph (15) (relating to aliens likely to become public charges) insofar as it relates to an application for adjustment to permanent residence.

(III) Paragraph (23) (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marihuana.

(IV) Paragraphs (27), (28), and (29) (relating to national security and members of certain organizations).

(V) Paragraph (33) (relating to those who assisted in the Nazi persecutions).

Subclause (II) (prohibiting the waiver of section 1182(a)(15) of this title) shall not apply to an alien who is or was an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act [42 U.S.C. 1382c(a)(1)]).

(iii) Special rule for determination of public charge

An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(15) of this title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

(C) Medical examination

The alien shall be required, at the alien's expense, to undergo such a medical examination (including a determination of immunization status) as is appropriate and conforms to generally accepted professional standards of medical practice.

* * * * *

(f) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) No review for late filings

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

(3) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1).

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(4) Judicial review

(A) Limitation to review of deportation

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

8 C.F.R. 245a.2:

(d) *Documentation.* Evidence to support an alien's eligibility for the legalization program shall include documents establishing proof of identity, proof of residence, and proof of financial responsibility, as well as photographs, a completed fingerprint card (Form FD-258), and a completed medical report of examination (Form I-693). All documentation submitted will be subject to Service verification. Applications submitted with unverifiable documentation may be denied. Failure by an applicant to authorize release to INS of information protected by the Privacy Act and/or related laws in order for INS to adjudicate a claim may result in denial of the benefit sought. Acceptable supporting documents for these three catagories are discussed below.

(1) *Proof of identity.* Evidence to establish identity is listed below in descending order of preference:

(i) Passport;

(ii) Birth certificate;

(iii) Any national identity document from the alien's country of origin bearing photo and fingerprint (e.g., a "cedula" or "cartilla");

(iv) Driver's license or similar document issued by a state if it contains a photo;

(v) Baptismal Record/Marriage Certificate; or

(vi) Affidavits.

(2) *Assumed names*—(i) *General.* In cases where an applicant claims to have met any of the eligibility criteria under an assumed name, the applicant has the burden of proving that the applicant was in fact the person who used that name. The applicant's true identity is established pursuant to the requirements of paragraph (d)(1) of this section. The assumed name must appear in the documentation provided by the applicant to establish eligibility. To meet the requirements of this paragraph documentation must be submitted to prove the common identity, i.e., that the assumed name was in fact used by the applicant.

(ii) *Proof of common identity.* The most persuasive evidence is a document issued in the assumed name which identifies the applicant by photograph, fingerprint or detailed physical decription. Other evidence which will be considered are affidavit(s) by a person or persons other than the applicant, made under oath, which identify the affiant by name and address, state the affiant's relationship to the applicant and the basis of the affiant's knowledge of the applicant's use of the assumed name. Affidavits accompanied by a photograph which has been identified by the affiant as the individual known to affiant under the assumed name in question will carry greater weight.

(3) *Proof of residence.* Evidence to establish proof of continuous residence in the United States during the requisite period of time may consist of any combination of the following:

(i) Past employment records, which may consist of pay stubs, W-2 Forms, certification of the filing of Federal income tax returns on IRS Form 6166, state verification of the filing of state income tax returns, letters from employer(s) or, if the applicant has been in business for himself or herself, letters from banks and other firms with whom he or she has done business. In all of the above, the name of the alien and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers should be on employer letterhead stationary, if the employer has such stationary, and must include:

(A) Alien's address at the time of employment;
(B) Exact period of employment;
(C) Periods of layoff;
(D) Duties with the company;
(E) Whether or not the information was taken from official company records; and
(F) Where records are located and whether the Service may have access to the records.

If the records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of (3)(i)(E) and (3)(i)(F) of this paragraph. This affidavit form-letter shall be signed, attested to by the employer under penalty of perjury, and shall state the employer's willingness to come forward and give testimony if requested.

(ii) Utility bills (gas, electric, phone, etc.), receipts, or letters from companies showing the dates during which the applicant received service are acceptable documentation.

(iii) School records (letters, report cards, etc.) from the schools that the applicant or their children have attended in the United States must show name of school and periods of school attendance.

(iv) Hospital or medical records showing treatment or hospitalization of the applicant or his or her children must show the name of the medical facility or physician and the date(s) of the treatment or hospitalization.

(v) Attestations by churches, unions, or other organizations to the applicant's residence by letter which:

(A) Identifies applicant by name;

(B) Is signed by an official (whose title is shown);

(C) Shows inclusive dates of membership;

(D) States the address where applicant resided during membership period;

(E) Includes the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery;

(F) Establishes how the author knows the applicant; and

(G) Establishes the origin of the information being attested to.

- (vi) Additional documents to support the applicant's claim may include:

(A) Money order receipts for money sent in or out of the country;

(B) Passport entries;

(C) Birth certificates of children born in the United States;

(D) Bank books with dated transactions;

(E) Letters or correspondence between applicant and another person or organization;

(F) Social Security card;

(G) Selective Service card;

(H) Automobile license receipts, title, vehicle registration, etc.;

(I) Deeds, mortgages, contracts to which applicant has been a party;

(J) Tax receipts;

(K) Insurance policies, receipts, or letters; and

(L) Any other relevant document.

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the special rule will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide:

(i) Evidence of a history of employment (i.e., employment letter, W-2 Forms, income tax returns, etc.);

(ii) Evidence that he/she is self-supporting (i.e., bank statements, stocks, other assets, etc.); or

(iii) Form I-134, Affidavit of Support, completed by a spouse in behalf of the applicant and/or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the affidavit of support shall be extended to other family members where family circumstances warrant.

(5) *Burden of proof.* An alien applying for adjustment of status under this part has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245a of the Act, and is otherwise eligible for adjustment of status under this section. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification as set forth in paragraph (d) of this section.

(6) *Evidence.* The sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. In judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation.

* * * * *

(k) *Applicability of exclusion grounds*—(1) *Grounds of exclusion not to be applied.* The following paragraphs of section 212(a) of the Act shall not apply to applicants for temporary resident status: (14) Workers entering without Labor Certification; (20) immigrants not in possession of a valid entry document; (21) visas issued without compliance with section 203; (25) illiterates; and (32) graduates of non-accredited medical schools.

(2) *Waiver of grounds of exclusion.* Except as provided in paragraph (k)(3) of this section, the Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised of the procedures for applying for a waiver of grounds of excludability on Form I-690. When an application for waiver of grounds of excludability is filed jointly with an application for temporary residence under this section, it shall be accepted for processing at the legalization office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the legalization office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the director of the Regional Processing Facility in whose jurisdiction the applicant's application for adjustment of status was filed except that in cases involving clear statutory ineligibility or admitted fraud, such application may be denied by the district director in whose jurisdiction the application is filed, and in cases returned to a Service Legalization Office for re-interview, such application may be approved at the discretion of the

district director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefor. Appeal from an adverse decision under this part may be taken by the applicant on Form I-694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of § 103.3(a) of this chapter.

(3) *Grounds of exclusion that may not be waived.* Notwithstanding any other provision of the Act, the following provisions of section 212(a) may not be waived by the Attorney General under paragraph (k)(2) of this section:

(i) Paragraphs (9) and (10) (criminals);

(ii) Paragraph (23) (narcotics) except for a single offense of simple possession of thirty grams or less of marijuana;

(iii) Paragraphs (27) (prejudicial to the public interest), (28) (communist), and (29) (subversive);

(iv) Paragraph (33) (participated in Nazi persecution).

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level, may be admissible under paragraph (k)(2) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash asistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he

or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

(5) *Public assistance and criminal history verification.* Declarations by an applicant that he or she has not been the recipient of public cash assistance and/or has not had a criminal record are subject to a verification of facts by the Service. The applicant must agree to fully cooperate in the verification process. Failure to assist the Service in verifying information necessary for the adjudication of the application may result in a denial of the application.

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(2)

No. 92-451

Supreme Court, U.S.
FILED
OCT 28 1992
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In The

Supreme Court of the United States

October Term, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

v.

CESAR A. PERALES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court have federal question jurisdiction over a claim that final INS legalization regulations violated the Immigration Reform and Control Act?

2. After finding that INS had implemented unlawful regulations throughout the whole of the INS designated application period, did the court have the authority to provide a remedy for that unlawful conduct?

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-451

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS,

v.

CESAR A. PERALES, ET AL. RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The petition should be denied because there is no conflict in the circuits on the issues presented and the Second Circuit's decision comports with Supreme Court precedent.

THE PETITION'S ERRORS AND OMISSIONS

A. Omission of a District Court Decision.

The petitioners failed to include the district court's order of March 29, 1989 (App., *infra*, 1a - 7a) in which the court ruled against petitioners on the second question presented herein.

B. Omission and Misstatement of the Regulations Challenged.

The petition does not accurately describe the regulations challenged in this case. The petition sets forth in its appendix provisions labeled 8 C.F.R. § 245a.2(d)(4) (1988) and 8 C.F.R. § 245a.2(k)(4) (1988). These do not represent the regulations challenged in this case nor the regulations in effect in 1988.

The regulatory provisions challenged in this case were those in effect as of May 1, 1987, 52 Fed. Reg. 16205; 8 C.F.R. § 245a.1(i) (1987), 8 C.F.R. § 245a.2(d)(4) (1987) and 8 C.F.R. § 245a.2(k)(4) (1987). (App., *infra*, 7a-8a) These regulations were amended on November 17, 1987, 52 Fed. Reg. 43843 (App. *infra*, 10a-11a) and further amended on July 12, 1989, 54 Fed. Reg. 29442, 8 C.F.R. § 245 a.1(i) (1989), 8 C.F.R. 245a.2(d)(4) (1989) and 8 C.F.R. §245a.2(k)(4) (1989) (App., *infra*, 11a-12a). To correct petitioners' errors the applicable regulations are reproduced in Appendix B. They are not discussed in detail because the petitioners' do not contest the Second Circuit's holding that the regulations were unlawful. The Second Circuit's opinion provides a detailed, accurate explanation of these regulations and their regulatory history. *Perales v. Thornburgh*, 967 F.2d 798, 802-03, 808-11 (2d Cir. 1992).

STATEMENT

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, created a one-time opportunity for undocumented aliens who lived "in a twilight, sub rosa society . . . vulnerable to exploitation" to legalize their status. 132 Cong. Rec. H9712-13 (Oct. 9, 1986) (Statement of Rep. Mazzoli). Congress intended

the amnesty application period to run for a full twelve months and to be "implemented in a liberal and generous fashion . . . to ensure true resolution of the problem and to ensure that the program will be a one-time only program " H.R. Rep. No. 99-682, Part 1, 99th Cong., 2d Sess. 71-73, *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 5676-5677. It also implemented an employer sanctions program to prevent undocumented aliens in the U.S. from working in the future. 8 U.S.C. § 1324a.

Congress recognized that the legalization program could succeed only if INS overcame "the fear of prosecution or deportation [that] would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status." *McNary v. Haitian Refugee Center*, 111 S. Ct. 888, 892 (1991). IRCA thus required that the Attorney General "broadly disseminate information" about legalization and its eligibility requirements beginning no later than the first day of the program. 8 U.S.C. § 1255a(i). INS's regulations required aliens to apply for temporary resident status -- the first phase of the legalization program -- between May 5, 1987 and May 4, 1988. 8 C.F.R. § 245a.2(a)(1) and set forth the eligibility criteria for legalization.

IRCA required that a legalization applicant show he was not likely to become a public charge, and stated that an applicant could show this by a history of self support. 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). Once the applicant showed that she met this and other eligibility criteria she had to be granted legalization. 8 U.S.C. § 1255a(a). The INS, however, implemented regulations that required more than self-support and also made the grant of legalization to a self-supporting alien discretionary. 8 C.F.R. §§ 245a.2(d)(4); 245a.1(i); 245a.2(k)(4); 52

Fed. Reg. 16211, 16208, 16212 (May 1, 1987). This case challenged these regulations as contrary to the statute.

Petitioners do not contest the Second Circuit's holding that these INS regulations violated IRCA.[1] In fact, INS admitted the unlawfulness of the regulations by changing them in 1989 after the INS designated application period closed. 54 Fed. Reg. 29448-29449 (July 12, 1989). Petitioners now assert only that the district court did not have the authority to decide whether the regulations comported with the statute and that, even if subject matter jurisdiction existed, the court did not have the authority to provide a remedy for INS implementation of unlawful regulations. Petition for a Writ of Certiorari, *Barr v. Perales*, 92-451 at 8 (hereinafter Perales Petition).

Respondents include individuals and a class[2] as well as the State and City of New York. The individuals are immigrant mothers and their U.S.

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[1] The same regulations challenged here were declared unlawful by a U.S. District Court in California and INS declined to appeal that ruling. *Zambrano v. INS*, Civ. No. 588-455 (E.D. Cal., July 31, 1989) *aff'd*, 972 F.2d 1122 (9th Cir. 1992).

[2] The class is composed of "(a) all undocumented aliens residing in New York State who may be excludable from the Legalization Program established by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255A, as likely to become public charges based in whole or in part upon the receipt of public assistance by the applicants' U.S. citizen or legal permanent resident dependents, and (b) all undocumented aliens residing in New York State who either failed to apply for legalization by May 4, 1988, or who abandoned their applications, because they believed that they were ineligible on public charge grounds." First Amended Class Action Complaint, ¶ 28, *Perales v. Thornburgh*, S.D.N.Y., No. 88 Civ. 2265.

citizen children. These women lived in the U.S. since before 1982 and have been self-supporting. Their U.S. citizen children at one time had received some type of public assistance to which they were legally entitled. During the INS-designated time period for applications, INS regulations required legalization applicants to demonstrate not only a history of "self-support" -- as IRCA prescribed -- but also a history of support of U.S. citizen family members without any public assistance. Thus, the published INS regulations that were in force throughout the entire application period excluded these immigrant mothers from the legalization program.

Respondents commenced an action challenging these regulations while the legalization application period was still open. The INS responded to the lawsuit by claiming that it had internally modified its policy so that, contrary to the clear language of its published regulations, self-supporting aliens would *not* be disqualified from legalization on account of public benefit receipt by U.S. citizen family members. Respondents sought a temporary injunction requiring INS to disseminate this unpublished policy reversal while the application period was still open and class members could still file for legalization. The district court denied the application in reliance on INS' representation that "on or before April 19, 1988," INS would "promulgate to all regional and district legalization offices, and all [QDEs] throughout the nation, definitive instructions" that a child's receipt of welfare would not exclude a parent who shows self-support. *Perales v. Meese*, 685 F. Supp. 52, 53 (S.D.N.Y.), *aff'd*, 847 F.2d 55 (2d Cir. 1988). But, contrary to its representation to the district court, INS failed to tell New York legalization offices and QDEs about the policy change before

the application period closed. *Perales*, 967 F.2d at 804.

The district court denied respondents' motion for a preliminary injunction relying on INS's representation that it was "attempting to locate applicants who were erroneously excluded under the more restrictive 'public charge' standard." *Perales*, 685 F. Supp. at 53-54. INS later admitted, however, that it had no evidence of any INS effort to locate adversely affected class members. The court also found that there was no irreparable injury because the court's equitable powers would allow for late filings under appropriate circumstances. *Perales*, 685 F. Supp. at 54-55.

The district court denied cross-motions for summary judgment. The court rejected petitioners' claim that *INS v. Pangilinan*, 486 U.S. 875 (1988), barred relief. (App., *infra* 5a-6a) Respondents moved for reargument on the facial invalidity of the challenged regulations. The parties settled that motion by Stipulation and Order which required INS to publish amended regulations making clear that applicants need establish only self-support, not family support, to avoid exclusion as a public charge, and that a family member's receipt of public cash assistance is irrelevant to that determination. *Perales*, 967 F.2d at 804. *See*, 54 Fed. Reg. 29442, 29443 (July 12, 1989). In a decision after trial the district court determined that the INS regulations were not facially invalid nor unlawful as applied and that a federal court did not have authority to compel the INS to open the application period. *Perales v. Thornburgh*, 762 F. Supp. 1036 (S.D.N.Y. 1991).

The Second Circuit reversed. The court first addressed the issue of subject-matter jurisdiction, noting, however, that the petitioners had conceded

subject-matter jurisdiction in a letter to the district court. *Perales*, 967 F.2d at 805. The court found that 8 U.S.C. § 1255(a)(f)(1), (3) and (4) did not deprive the court of jurisdiction. The Second Circuit relied on this Court's decision in *McNary v. Haitain Refugee Center, Inc.*, 111 S. Ct. 888 (1991). The Second Circuit found that § 1255a(f)(1), (3) and (4) were identical to 8 U.S.C. §§ 1160(e)(1)-(3) which were at issue in *McNary* and that the *McNary* court found that these provisions applied "only to review of denials of individual . . . applications." *Perales*, 967 F.2d at 806 quoting *McNary*, 111 S. Ct. at 897.[3]

The Second Circuit also found that 8 U.S.C. § 1255a(f)(2) did not deprive the district court of jurisdiction. Again, the Second Circuit relied on the reasoning in *McNary* to find that § 1255a(f)(2) did not apply to a challenge to an INS regulation, only to denials of individual applications. The court found nothing in the plain language of the statute nor its legislative history to insulate from judicial review INS regulations that had "the effect of shortening or eliminating altogether the

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[3] The Second Circuit found "§ 1255 a(f)(4)'s requirement that judicial review be 'based solely on the administrative record' under an 'abuse of discretion' standard is inappropriate for review of statutory or constitutional claims which are generally reviewed de novo by the courts." *Perales*, 967 F.2d at 806. Further, the Second Circuit cited *McNary* to state that Congress could easily have used broader statutory language if it had intended to limit the review provisions to encompass a challenge to INS regulations. *Perales*, 967 F.2d at 806. Finally, the court found that a determination that the challenged regulation were unlawful would result not in an ultimate determination of eligibility, but rather only an opportunity to file timely applications which may or may not be filed and may or may not be denied. *Perales*, 967 F.2d at 806-807.

statutory application period." *Perales*, 967 F.2d at 807.

The Second Circuit then held that INS regulations violated IRCA in two respects. First, the regulations unlawfully converted a statutory entitlement into a discretionary benefit. Second, the regulations unlawfully demanded more from a legalization applicant than demonstration of self-support. Further, the court found that the INS disseminated the very aspects of the regulations which the court held unlawful. This unlawful conduct "eviscerated" the legalization application period. *Perales*, 967 F.2d at 808-11, 814.

Having found injury, the Second Circuit turned to the common remedy for unlawful agency action, injunctive relief. The court provided an opportunity to apply for legalization for aliens who could demonstrate they had been dissuaded from applying by INS' unlawful regulations. The court did not find anything in the case of *INS v. Pangilinan*, 486 U.S. 875 (1988) to prevent such a remedy. The court found the circumstances of *Pangilinan* distinguishable. Further, the court held that unlike the congressional purpose underlying the statute at issue in *Pangilinan*, the congressional purpose underlying IRCA could only be given effect by providing a remedy to applicants whose opportunity to apply had been eviscerated by unlawful INS conduct. *Perales*, 967 F.2d at 811-14.

Reasons for Denying the Writ

POINT I

CERTIORARI WAS IMPROVIDENTLY GRANTED IN *BARR V. CATHOLIC SOCIAL SERVICES, INC.* AND SHOULD BE DENIED IN THIS CASE.

A. Contrary to Petitioners' Assertion in CSS, There is No Conflict in the Circuits on the Issue of District Court Jurisdiction to Review Challenges to INS Legalization Regulations.

Petitioners assert that the writ should be granted in this case because it raises questions similar to those pending before the Court in *Barr v. Catholic Social Services, Inc.*, No. 91-1826 (hereinafter *CSS*). Perales Petition at 8. The basis for the petition for certiorari in *CSS* was the erroneous contention that there is conflict in the circuits on the issue of district court jurisdiction to review INS' legalization regulations. The *CSS* petition points to the case of *Ayuda, Inc. v. Thornbugh*, 948 F.2d 742 (D.C. Cir. 1991), *petition for cert. pending*, No. 91-1924, as being in conflict with the decision in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir. 1992), *cert. granted sub. nom., Barr v. Catholic Social Services, Inc.*, 112 S. Ct. 2990 (1992). *CSS* petition at 10. To the contrary, the decision of the D.C. Circuit denying rehearing *en banc* in *Ayuda* makes clear that there is no intercircuit conflict on the question presented here and in *CSS*: whether IRCA precludes general federal question jurisdiction over a claim that final INS legalization regulations violate that statute. *Ayuda, Inc. v. Thornburgh*, 958 F.2d 1089 (D.C. Cir. 1992).

Judge Silberman, joined by Judge Ginsburg authored the *Ayuda* panel decision relied upon by

CSS petitioners for their claim of intercircuit conflict.[4] In a separate opinion supporting the denial of rehearing *en banc*,[5] Judge Silberman, again joined by Judge Ginsburg, concluded that there is *no* "intercircuit dispute" on the question of subject-matter jurisdiction to review INS regulations. He noted that the Seventh Circuit in *Morales v. Yeutter*, 952 F.2d 954 (7th Cir. 1991), had upheld district court jurisdiction to review formal final INS legalization regulations as had the Ninth Circuit in *CSS*. Judge Silberman distinguished *Morales* and *CSS* on the ground that *Ayuda* did not involve a challenge to "formal (and final) regulations." *Ayuda*, 958 F.2d at 1093. Judge Posner drew this same distinction in *Morales*, 952 F.2d at 957. Thus, three circuits -- the Second, Seventh, Ninth -- agree that the district courts have subject-matter jurisdiction over challenges to INS legalization regulations and the D.C. Circuit has expressed no disagreement.

B. There is No Conflict in the Circuits on the Issue of Judicial Authority to Remedy Unlawful INS Action.

Similarly, there is no intercircuit conflict on the second question presented by petitioners: whether the federal judiciary can provide a remedy for INS'

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[4] The *Ayuda* panel had decided, on the alternative grounds of lack of either ripeness or subject matter jurisdiction, that the district court could not consider the contention that INS misinterpreted the legalization statute by failing to recognize persons who had not filed a particular form as "known to the government." The plaintiffs had argued that this failure was a challengable INS practice. *Ayuda*, 948 F.2d at 745, 754.

[5] The D.C. Circuit denied a hearing en banc per curiam, with five members in favor of granting rehearing. Judges Wald and Williams pointed to the lack of ripeness holding as the basis for the Circuit's decision to deny rehearing en banc, *Ayuda*, 958 F.2d at 1090, 1093.

illegal administration of the legalization program. The Second Circuit and three panels of the Ninth Circuit have answered this question in the affirmative. *Perales*, 967 F.2d at 811-14; *Legalization Assistance Project v. INS*, ___ F.2d ___ (9th Cir. Sept. 18, 1992) (1992 WL 232145); *CSS*, 956 F.2d at 919-921; *Zambrano*, 972 F.2d at 1124. The D.C. Circuit, in *Ayuda*, did not reach this issue. *Ayuda*, 948 F.2d at 756.

There being no intercircuit conflict on either issue presented, certiorari was improvidently granted in *CSS* on that basis and should not be granted here. *See, Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 at 392-93 (1923). *See also*, Supreme Court Rule 10.1(a).

C. The Circuit Court Rulings in This Case and CSS Are Completely Consistent With Supreme Court Precedent.

As this Court reaffirmed only two terms ago, there is a "well-settled presumption" allowing judicial review of agency action. *McNary*, 111 S. Ct. at 898; *see also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). The circuit courts' determinations in this case and *CSS* that subject-matter jurisdiction exists for challenges to agency regulations violative of federal statutes is fully consistent with this Court's precedent. *See, e.g., Bowen*, 476 U.S. 667; *Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir. 1991).

Petitioners' position, on the other hand, is completely contrary to the norm of effective and fair judicial review of whether agency regulations comply with a statute. In this case, petitioners' position would allow the INS to prevent any judicial review of its admitted unlawful action and therefore to violate the law with impunity.

According to petitioners' position any judicial consideration of whether agency regulations comport with the statute would depend entirely on whether the INS affirmatively decided to initiate a deportation proceeding.

The consequences of this position for the respondent alien mothers and their citizen children would be devastating. The mothers would be subject to deportation and foreclosed access to lawful employment. *See, McNary*, 111 S. Ct. at 891, 895. Their citizen children would be doomed to perpetual welfare dependency and either the oppressive underground life of their undocumented parents or total deprivation of their parents. As this Court found in *McNary*, such a scenario is tantamount to complete denial of judicial review. *McNary*, 111 S. Ct. at 898.

Further, under petitioners' position, even if INS did initiate a deportation proceeding, the issue of whether the regulations comport with the statute would be forced through components of the agency that have no authority to determine that issue. After such costly inefficient and useless delay the Court of Appeals would confront the issue without the benefit of district court consideration. Moreover, the court's determinations could not occur within the one year time period set for legalization, thus assuring that the judiciary would not have an effective, meaningful voice in stating what a statute means. This is "the practical equivalent of total denial of judicial review" of statutory claims. *McNary*, 111 S. Ct. at 898.

Additionally, the circuit court rulings in *CSS* and this case on the relief issue, fully comport with IRCA and this Court's precedents. Petitioners sought *certiorari* in *CSS* on the assertion that the Ninth Circuit's allowance of a judicial remedy there conflicts with "this Court's analysis in [*INS v.*]

Pangilinan," 486 U.S. 875 (1988). CSS Petition at 20. Subsequent to the government's petition in *CSS*, the Second Circuit issued its decision in *Perales*, holding that nothing in IRCA or *Pangilinan* strips the federal judiciary of its traditional power to remedy agency violations of federal law. *Perales*, 967 F.2d at 811-14. *See, Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) (noting the settled presumption that Congress "expects the courts to grant relief when an executive agency violates [a statutory] command").[6] The Second Circuit's discussion of the issue convincingly refutes the arguments asserted in the *CSS* petition and should be reviewed by this Court before proceeding to plenary consideration in *CSS*. *Perales*, 967 F.2d at 811-14.

In essence, petitioners' contention is that *Pangilinan* indiscriminately bars judicial relief in any case involving an immigration statute and a filing deadline.[7] This proposition is illogical, since in the name of deference to Congress, it would prohibit judicial relief even where such relief *advances* congressional intent. As the Second Circuit rightly concluded, *Pangilinan* simply does not posit such an extreme and irrational rule. Rather, in *Pangilinan*, this Court carefully determined Congress' intent with respect to the statutes at issue and gave effect to that intent.

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[6] As noted above, petitioners have now conceded that INS violated federal law in its administration of the legalization program.

[7] Petitioners asserted that *Pangilinan* is "on all fours with" *CSS*. CSS Petition at 17. But the underlying statutes in the two cases -- the Naturalization Act of 1940, as amended, and IRCA -- bear no resemblance to one another with respect to legislative mandate, policy or intent.

Thus, there is no credible claim that the Second and Ninth Circuits failed to abide by *Pangilinan*, since the teaching of that decision is that congressional intent controls. This Court's only statement on the congressional intent behind IRCA appears in *McNary*, which reaffirmed that Congress intended to create a "broad," remedial legalization program. *McNary*, 111 S. Ct. at 890-92 & nn 4-5. Consistent with *McNary*, both the Second and Ninth Circuits concluded that Congress did not intend to bar traditional judicial remedies for those injured by INS' violations of federal law. *Perales*, 967 F.2d at 812-14; *CSS*, 956 F.2d at 921-23. Nothing in IRCA, and no decision of this Court is remotely to the contrary.

POINT II

IF THIS COURT RULES FOR PETITIONERS IN CSS, THERE ARE OUTSTANDING ISSUES IN THIS CASE WARRANTING A REMAND TO THE SECOND CIRCUIT.

The petitioners state that the Second Circuit's decision in this case should be reversed if this Court determines that the court in *CSS* did not have authority to determine whether an INS regulation comported with IRCA. Perales Petition at 8. If this Court makes such a determination in *CSS*, the *Perales* case should not be reversed, rather it should be remanded to the Second Circuit.

There were several claims the Second Circuit did not address in this case. *Perales v. Thornburgh*, 967 F.2d at 814. The first is plaintiffs' constitutional challenge to INS' regulations and administration of IRCA. Petitioners concede that the presumption in favor of judicial review of constitutional claims is even stronger than the presumption in favor of review of statutory claims.

Brief for Petitioners, *Barr v. CSS*, No. 91-1826 p. 20. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 373-374 (1974).

Further the Second Circuit did not consider the plaintiffs' APA claims or their challenge to INS' dissemination policies. The claim in this case that INS violated IRCA by its dissemination policies and practices fits squarely into *McNary* even under the *Ayuda* court's assertion that *McNary* addressed only claims that did not focus on eligibility criteria. *Ayuda*, 948 F.2d at 753. Therefore, even if this Court finds there was no subject-matter jurisdiction in *CSS*, it should remand this case to the Second Circuit.

Also, if this Court agrees with petitioners that in *CSS* the Ninth Circuit lacked authority to provide an opportunity for legalization applicants to file applications after the INS-imposed deadline, this case should be remanded to the Court of Appeals for the Second Circuit. The Second Circuit based its remedy decision on only one of the claims made and the specific facts of the *Perales* case as applied to that one claim. The other claims and the appropriate remedies would have to be assessed. In particular, respondents' constitutional claims stand on a different footing from the statutory claims in *CSS*, since federal judicial authority to remedy legal wrongs is at its height where constitutional rights have been abridged. *See, Pangilinan*, 486 U.S. at 885-886 (separately analyzing constitutional claims after concluding that Congress intended to foreclose relief for alleged statutory violations). Therefore, remand and not reversal would be appropriate.

If this Court affirms the *CSS* determinations on subject matter-jurisdiction and remedy, the decision in this case should be affirmed or the writ denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 29, 1992

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CESAR PERALES, et. al.,
Plaintiffs,

-and-

LINDA LOE, SUSAN SOE, MARY MOE, FRAN FOE, and ZELDA ZOE, individually, on behalf of their minor children, and on behalf of all others similarly situated and their minor children,
Plaintiff-Intervenors,

-v-

EDWIN MEESE, III, et al.,
Defendants.

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88 Civ. 2265 (KC)

MEMORANDUM AND ORDER

Kenneth Conboy, District Judge:

I. CLASS CERTIFICATION

Plaintiffs seek certification of a class composed of:

> [a]ll undocumented aliens residing in New York State who may be excludable from the Legalization Program established by IRCA as "likely to become public charges" under the standards set forth in INS regulations 8 C.F.R. §§ 245a.1 (i), 245a.2(d) (4) and 245a.2(k) (4) based in whole or in part upon the receipt of public cash assistance by the applicant's U.S. citizen or legal permanent resident family members, including but not

> limited to those individuals who were deterred from filing applications for legalization under the Legalization program.

(complaint ¶ 15 at 8-9). Most of the factors asserted by plaintiffs in support of class certification are not challenged by defendants and need only be discussed briefly.

23(a)

NUMEROSITY

Plaintiffs' reasonable estimates about the size of the class, as well as the class's relative isolation and dispersement, indicate that joinder is impractical.

COMMONALTY

There is at least one question of law common to all proposed class members. That is whether, as undocumented aliens whose family members receive public cash assistance, they were subject to unduly restrictive eligibility regulations. Furthermore, each class member was confronted with the same allegedly deficient dissemination efforts on the part of the Immigration and Naturalization Service ("INS").

TYPICALITY

Defendants' most significant objections are (or should be) directed at the atypicality of the proposed class representatives. They argue that each proposed class member's right to relief will depend on unique facts, the most important of which is the class member's subjective state of mind. In addition to potential differences in the effect of the government's actions or inactions on each class member's state of mind, there will likely be differences between the exact information each class member received; the source of such

information (e.g. from the regulations themselves, from government officials, or from third parties); if received from a third party, whether the information was misstated; and the extent of the class member's efforts to obtain accurate information. While the existence and extent of an individual class member's reliance on erroneously or inadequately disseminated information, as well as the extent of the class member's efforts to obtain accurate information, may affect his or her right to relief, it does not mean that class certification is inappropriate. Where, as here, the proposed representatives' claims arise from the same course of conduct and are based on the same legal theories, unique defenses or individual fact differences do not render the proposed representatives' claims atypical. 1 H. Newberg, On Class Actions, §§ 3.13 to 3.16 (2d ed. 1985); see also In re Am International, Inc. Securities Litigation, 108 F.R.D. 190, 194 (S.D.N.Y. 1985) (fact that individualized questions of reliance in securities fraud action may exist is not sufficient to defeat class certification). If necessary, separate trials can be held on issues that require individualized treatment.

ADEQUACY OF REPRESENTATION

Plaintiffs are represented by experienced and resourceful counsel and the plaintiffs have no apparent conflicts with other potential class members. Accordingly, the Court finds that the named plaintiffs will adequately represent the class.

23(b)

Certification is clearly appropriate under 23(b) (2). Plaintiffs seek declaratory and injunctive relief arising out of the government's actions and inactions in its promulgation and dissemination of eligibility standards under IRCA. In effect, this lawsuit involves allegations that the government has acted or refused to act on grounds generally applicable to the proposed class. Accordingly, class certification is granted.1

II. SUMMARY JUDGMENT

Plaintiffs move for partial summary judgment, seeking a ruling that 1) defendants' "public charge" regulations facially violate IRCA and the Equal Protection component of the Fifth Amendment 2) defendants' failure to disseminate accurate eligibility standards to the public and their issuance of regulations that were at best ambiguous and misleading violate IRCA and the Fifth Amendment, and 3) that equitable tolling of the May 4 deadline (or similar relief) will be available to those class members who can demonstrate that they were deterred from applying for legalization by defendants' illegal policies. The defendants oppose the motion in all respects and cross-move for summary judgment, seeking a ruling that a) the public charge regulations are legal and were properly and clearly disseminated, and b) the Court has no power to grant the type of relief sought, regardless of the merits of the claims, in light of the expiration of the amnesty period on

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1 Defendants also contend that the governmental plaintiffs lack parens patriae standing to maintain this action. Because at least one of the individual plaintiffs has standing, it is unnecessary to consider this issue. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264 n.9 (1977).

May 4, 1988. The Court will deal with this last contention first.

In arguing that the Court has no power to extend the application period, regardless of the merits of plaintiffs' attack on the INS's administration of the legalization program, defendants rely principally on INS v. Pangilinan, 108 S. Ct. 2210 (1988). Although the parameters of the Court's power to grant the type of relief sought here is by no means clear, I do not accept the broad reading of Pangilinan asserted by defendants. In this regard, the Court concurs with the reasoning of League of United Latin American Citizens v. INS, No. 87 Civ. 4457 slip op. (C.D. Cal., Aug. 12, 1988). I would add only a few brief points. Contrary to defendants' assertion the Pangilinan Court must have concurred in the Ninth Circuit's finding that the statute at issue there had been violated, the clear import of the opinion was that the challenged actions were at all times consistent with congressional intent. Not only was there no specific statutory mandate to maintain a naturalization officer in the Philippines during the relevant period, but, as the Court observed, non citizen Filipino servicemen fared better on balance in the implementation of the 1942 amendments to the Nationality Act than non citizen servicemen from other parts of the world. Here, in contrast, it is alleged that the INS violated specific congressional mandates by promulgating unduly restrictive regulations and inadequately and/or misleadingly disseminating information about the same. It is also significant that Pangilinan separately discussed two constitutional attacks on the implementation of the 1942 amendments after ruling that the courts had no power to confer citizenship in violation of clear congressional policy. If the Court were positing a

per se rule that the expiration of an application cut-off date absolutely precludes judicial remedies, regardless of the theory supporting relief, it would have been simpler and more logical to avoid any discussion of the merits of the plaintiffs' claims. Finally, as the Court reasoned, it would have been absurd to conclude that consideration of applications under the 1942 amendments, filed 30 years after the deadline, would be consistent with congressional intent when Congress enacted subsequent legislation that effectively led to the denial of citizenship to Filipinos who filed timely applications under those amendments.

As to the remaining issues, the Court declines to grant summary judgment for either side. Although the complexity and importance of a case is not in all instances an obstacle to summary adjudication, I find that the circumstances here favor forbearance until a full record is developed on all material issues. Cf. Kennedy v. Silas Mason co., 334 U.S. 249 (1948); McWhirter Distributing, Co. v. Texaco, Inc., 668 F.2d 511 (1981); Elliot v. Elliot, 49 F.R.D. 283 (S.D.N.Y. 1970).

III. INTERVENTION

The motion for intervention is granted.

SO ORDERED

Dated: New York, New York
March 29, 1989

Kenneth Conboy, U.S.D.J.

APPENDIX B

8 C.F.R. §245a.2(d)(4), 52 Fed. Reg. 16211 (May 1, 1987)

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment. the burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant

8 C.F.R. §245a.1(i), 52 Fed. Reg. 16208 (May 1, 1987)

(i) "Public cash assistance" means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet

subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

8 C.F.R. §245a.2(k)(4), 52 Fed. Reg. 16212 (May 1, 1987)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible under paragraph (k)(2) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. the weight given in considering applicability of the public charge provisions will depend on may factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

8 C.F.R. §245a.2(k)(2), 52 Fed. Reg. 16212 (May 1, 1987)

(2) Waiver of grounds of exclusion. Except as provided in paragraph (k)(3) of this section, the Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised on the procedures for applying for a waiver of grounds of excludability on Form I-690. When an application for waiver of grounds of excludability is filed jointly with an application for temporary residence under this section, it shall be accepted for processing at the legalization office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the legalization office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the director of the Regional Processing Facility in whose jurisdiction the applicant's application for adjurstment of status was filed except that in cases involving clear statutory ineligibility or admitted fraud, such application may be denied by the district

director in whose jurisdiction the application is filed, and in cases returned to a Service Legalization Office for re-interview, such application may be approved at the discretion of the district director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefor. Appeal from an adverse decision under this part may be taken by the applicant on Form I-694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of § 103.3(a) of this chapter.

8 C.F.R. §245a.2(k)(4), 52 Fed. Reg. 43844 (Nov. 17, 1987)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. the weight given in considering applicability of the public charge provisions will depend on may factors, but the length of time

an applicant has received public cash assistance will constitute a significant factor.

8 C.F.R. §245a.2(d)(4), 54 Fed. Reg. 29449 (July 12, 1989)

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges. generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the special rule will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide.

8 C.F.R. §245a.1(i), 54 Fed. Reg. 29448 (July 12, 1989)

(i) "Public cash assistance" means income or needs-based monetary assistance to include, but not limited to, supplemental security income received by the alien through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public

housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

8 C.F.R. §245a.2(k)(4), 54 Fed. Reg. 29449 (July 12, 1989)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level, may be admissible. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors; but the length of time an applicant has received public cash assistance will constitute a significant factor.